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No. 02-

IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, Ph.D., GERALD MOSS, M.D., ELIZABETH HOFFMAN, Ph.D., DAVID C. BROSKI and JAMES J. STUKEL, Ph.D.,

Petitioners,

v.

NAVREET NANDA and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, against the shield of sovereign immunity afforded the States by the Eleventh Amendment, Congress' enactment of the 1972 Amendments to Title VII was an appropriate exercise of congressional authority under Section 5 of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners are the Board of Trustees of the University of Illinois; Bellur Prabhakar, Ph.D.; Gerald Moss, M.D.; Elizabeth Hoffman, Ph.D.; David C. Broski; and James J. Stukel, Ph.D. Respondents are Navreet Nanda and the United States of America, which intervened in the proceedings to defend the constitutionality of 42 U.S.C. § 2000e-2(a)(1) and (2) as applied to States as sovereign entities.

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Petitioners respectfully Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit in *Nanda v. Board of Trustees of the University of Illinois, et al.* was filed on September 17, 2002 and is reported at 303 F.3d 817 (7th Cir. 2002). The decision of the district court was filed on August 21, 2001 and is reported at 219 F. Supp. 2d 911 (N.D. Ill. 2001).

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e *et seq.*, 42 U.S.C. §§ 1983, 1988, and 28 U.S.C. § 1331. The Seventh Circuit asserted jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on September 17, 2002. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

U.S. Const. amend. XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XIV, §§ 1, 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*****

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 775 ILCS 5/2-102. Civil Rights Violations – Employment

Section 2-102. Civil Rights Violations – Employment. It is a civil rights violation:

(A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.

§ 775 ILCS 5/1-103. General Definitions

Section 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

(Q) Unlawful Discrimination. "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, or unfavorable discharge from military service as those terms are defined in this Section.

STATEMENT OF THE CASE

This Petition presents an ongoing substantial federal question that is of essential importance to every State. In 1976, Justice Rehnquist in *Fitzpatrick*, with considerable prescience, reserved for future judgment the substantial federal question as to whether, against the shield of sovereign immunity afforded the States by the Eleventh Amendment, Congress' enactment of the 1972 Amendments to Title VII was an appropriate exercise of its congressional authority under Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11 (1976). That substantial federal question is now, twenty six years after *Fitzpatrick*, squarely before the Court.

This action involves a claim by Navreet Nanda, Ph.D., a non-tenured assistant professor, based on Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-2(a)(1) and (2), against the Board of Trustees of the University of Illinois for certain harassment actions and for terminating her employment at the University solely because of her female sex, Asian race and Indian national origin.[1] The University filed a motion to dismiss Dr. Nanda's Title VII claim asserting that Congress failed to respect the State's Eleventh Amendment sovereign immunity and plainly exceeded the authority granted it under Section 5 of the Fourteenth Amendment when, in 1972, it extended coverage of the substantive provisions of the 1964 Civil Rights Act to the States. The University contended that (i) the 1972 Amendments to Title VII were not remedial in nature; (ii) under existing Eleventh Amendment and Fourteenth Amendment Section 5 jurisprudence, sovereign states, unlike private citizens, are presumed not to engage in unconstitutional and discriminatory behavior; (iii) to support abrogation of the States' Eleventh Amendment sovereign immunity, Congress must first, as a "*conditio sine qua non*", overcome that presumption by demonstrating in its legislative record evidence of a "*de facto*" widespread pattern of the targeted unconstitutional behavior by the sovereign States; and (iv) the legislative record of the 1972 Amendments to Title VII of the Civil Rights Act was bereft of such evidence.

The district court denied the University's motion to dismiss Nanda's Title VII claim. Relying upon *Fitzpatrick* and *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), the district court stated that those cases held that Congress' 1972 amendments met the "congruence and proportionality test" under Section 5 jurisprudence and also that the legislative record under scrutiny demonstrated that the States, in fact, had engaged

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1. Nanda also asserted a claim under 42 U.S.C. § 1983 and a pendent state law tort claim against certain University officials neither of which constitute subject matter for purposes of this Petition.

in the targeted unconstitutional behavior. The district court, however, did not engage in an independent analysis as to whether the challenged legislation met the "congruence and proportionality test," nor did it independently scrutinize the legislative record of the 1972 Amendments, relying instead on the *Okruhlik* Court's recitation as to what the record revealed.

Thereafter, on September 18, 2001, the University appealed the district court's ruling to the Seventh Circuit pursuant to the collateral order doctrine. In respect to Dr. Nanda's Title VII claim, the Seventh Circuit affirmed the district court. In its decision, the Seventh Circuit rejected the University's contention that the Supreme Court's recent decisions had established a higher bar for congressional abrogation of the States' Eleventh Amendment immunity. Specifically, the Seventh Circuit rejected the University's contentions that (i) the 1972 Amendments to Title VII were not remedial in nature; (ii) sovereign States, unlike private citizens, presumptively do not engage in unconstitutional behavior; (iii) to support abrogation, Congress must first, as a "*conditio sine qua non*", overcome that presumption by demonstrating with explicit findings in its legislative record a "*de facto*" widespread pattern of the targeted unconstitutional behavior by the States; and (iv) the legislative record of the 1972 Amendments were bereft of the required findings.

Significantly, the Seventh Circuit declined to rely upon *Fitzpatrick*, which had been relied upon by both the district court and the Eighth Circuit in *Okruhlik*, stating that ". . . the most prudent course is to assume that neither *Fitzpatrick* nor our earlier summary treatment of the issue through reliance on *Fitzpatrick* necessarily disposes of the issue before us." *Nanda v. Board of Trustees of the Univ. of Illinois, et al.*, 303 F.3d 817, 822 (7th Cir. 2002); App. A[2]. The Seventh Circuit instead relied upon language in *City of Boerne v. Flores*,

2. "App." denotes reference to the Appendices attached to this Petition.

521 U.S. 507 (1997), *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), that the state of the legislative record pertaining to the 1972 Amendments was not a "*conditio sine qua non*" requirement, but rather only "one means," confirmatory in nature, to determine whether Title VII was proper remedial legislation in respect to sex, race, and national origin discrimination. The Seventh Circuit further relied upon its decisions in *Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000), and *Cherry v. University of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001), involving the Equal Pay Act, 29 U.S.C. § 206(d), in which the Seventh Circuit expressly rejected the view that explicit legislative findings were a necessary element of a Section 5 inquiry. The Seventh Circuit expressly dismissed the argument that *Garrett* "established a new, bright-line rule that Congress' attempt to abrogate immunity from a federal statute is invalid if the statute lacks specific findings that the States had engaged in a pattern of unconstitutional conduct of the type prohibited by the statute." *Nanda*, 303 F.3d at 828; App. A at 22a. Instead, the Seventh Circuit held that ". . . [a]ll *Garrett* does is further demonstrate that the legislative record is an important factor when the statute in question pervasively prohibits constitutional State action." *Id.*

Although the Seventh Circuit stated that the legislative record relating to 1972 Amendments to Title VII was not determinative of the inquiry, it nevertheless proclaimed that it was "the most telling means" of assessing the depth of the constitutional problem and the consequent need for a congressional remedy. *Nanda*, 303 F.3d at 827; App. A at 19a. The Seventh Circuit then concluded that the legislative record of the 1972 Amendments demonstrated that the States had engaged in the targeted unconstitutional behavior. In support for this conclusion, the court cited to four pages of conclusory

statements in the legislative record and also to the "well-documented history of gender [and race] discrimination in this Nation. . . ." not found in the legislative record. *Nanda*, 303 F.3d at 830-831; App. A at 27a-28a. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit concluded that the 1972 Amendments to Title VII were a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment based upon a three part rationale. First, because the protections legislated in the 1972 Amendments to Title VII were co-extensive with the protections afforded citizens by Section 1 of the Fourteenth Amendment, the 1972 Amendments were *ipso facto* remedial in nature and abrogation of the States' Eleventh Amendment immunity, *without more*, occurred. Second, explicit findings in the legislative record of a widespread pattern of the targeted unconstitutional behavior by the States are never a necessary condition to a determination of whether the legislation being challenged is remedial in nature, but rather that evidence of *any* kind in the record, *in all instances,* is only confirmatory of the determination. Third, the Seventh Circuit asserted that a single study relating solely to hiring practices in certain metropolitan areas of the country in respect to African-Americans and several general conclusory statements as to gender discrimination in academia by the States contained *in* the legislative record of the 1972 Amendments to Title VII, together with the history of gender discrimination set out in Supreme Court jurisprudence *outside* of the legislative record, constituted sufficient confirmatory evidence that the 1972 Amendments were remedial in nature.

The conclusion reached by the Seventh Circuit that the 1972 Amendments were a valid exercise of Congress' authority under Section 5, and the Court's reasons therefore, conflict with the decisions of five other circuit courts, in respect to determining

whether legislation involving gender based classifications is valid under Section 5. In addition, this Petition raises a substantial federal question as to the scope of Congress' authority under Section 5, vis-a-vis state sovereign immunity, that is recurring in nature. Further, the Seventh Circuit's decision is contrary to the well established Eleventh Amendment and Fourteenth Amendment jurisprudence of this Court.

I. THE COURT SHOULD RESOLVE A LOWER-COURT SPLIT OVER WHETHER THE 1972 AMENDMENTS TO TITLE VII, ESPECIALLY IN RESPECT TO GENDER BASED CLASSIFICATIONS, ARE APPROPRIATE ENFORCEMENT LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The Seventh Circuit's decision conflicts with decisions in respect to federal legislation involving gender based classifications in the First, Third, Fourth, Fifth and Eleventh Circuits. In *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), the Fifth Circuit reviewed section 2612(a)(1)(C), the gender based section of the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, and concluded that the provision was congressional overreaching that attempted to change the substance of the Equal Protection Clause rather than a remedy to a state constitutional violation. In doing so, the Fifth Circuit applied a two-step test based on this Court's decision in *Kimel*:

> At the first step, we begin our analysis by determining what type of constitutional violation the statute under review is designed to prevent. . . . [A]t *Kimel*'s second step, [we examine] the legislative record of the statute under review to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions.

Kazmier, 225 F.3d at 524 (emphasis in original). Applying this test, the Fifth Circuit observed that "[t]he mere invocation by Congress of the specter of sex discrimination . . . is insufficient to support the validity of legislation under Section 5." *Id.* at 526. In addition, the court held that no evidence supported the assertion that section 2612(a)(1)(C) remedied unconstitutional state conduct because "the legislative record for this provision is devoid of evidence of public sector discrimination." *Id.* In the Fifth Circuit's view, the lack of evidence, combined with the "broad swath" of constitutional conduct the section prohibits, meant that section 2612(a)(1)(C) was not appropriate remedial legislation. *Id.*

Likewise, the Third Circuit held in *Chittister v. Department of Community & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000), that the FMLA was not appropriate remedial legislation. The circuit court framed the question before it as whether Congress had made "any finding concerning the existence" of leave practices "that amounted to intentional gender discrimination in violation of the Equal Protection Clause." *Id.* at 228-229. It noted that there was no "substantial evidence of such violations in the legislative record" and concluded that the FMLA's mandatory leave requirement could not be said "to be congruent or proportional to any identified constitutional harm, and it cannot be said to be tailored to preventing any such harm." *Id.* at 229.

The Fourth Circuit's analysis of the FMLA in *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), is nearly identical. There, the court refused to credit the FMLA as a remedy to unconstitutional gender discrimination because "Congress did not identify, as it is required to do so, any pattern of gender discrimination by the [S]tates with respect to the granting of employment leave for the purpose of providing family or medical care." *Lizzi*, 255 F.3d at 135.

The decisions of the First and Eleventh Circuits are no different in their reasoning and analysis. *See Laro v. New*

Hampshire, 259 F.3d 1, 13 (1st Cir. 2001) (stating that "[w]here the connection between the provision at issue and gender-based discrimination is indirect at best, it is incumbent on Congress either to establish a clear link to the prevention of unconstitutional gender discrimination or to identify problematic state practices to which the provision responds."); *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001) (holding that "this type of anecdotal legislative history [as is found in the FMLA] is insufficient to indicate Congress had identified particular unconstitutional actions by the [S]tates involving serious health conditions irrespective of gender or family situations.")

The Seventh Circuit's decision clearly conflicts with these FMLA cases in respect to the required analysis of the 1972 Amendments to Title VII legislation under scrutiny vis-a-vis gender based classifications. Like the Seventh Circuit, these circuit courts considered gender based classification provisions of federal legislation that purported to remedy gender discrimination in the workplace. While the Seventh Circuit expressly "rejected the view that explicit legislative findings were a necessary element of the Section 5 inquiry," *Nanda*, 303 F.3d at 827-828; App. A at 20a; *Varner*, 226 F.3d at 935; *Cherry*, 265 F.3d at 549, none of the other circuit courts abandoned the requirement in this Court's precedent that Congress remedy *actual constitutional violations by the States*. Rather, each circuit court, other than the Seventh Circuit, applied this Court's Section 5 precedent and thoroughly examined the enactment's legislative history for the required evidence that Congress intended to remedy an actual, widespread pattern of existing unconstitutional State conduct. Finding none, each circuit court, other than the Seventh Circuit, held that the enactment did not pass constitutional muster.

The conflict between the Seventh Circuit on the one hand and the First, Third, Fourth, Fifth, and Eleventh Circuits on the

other, over the proper standards to apply in determining whether legislation that concerns gender-based classifications is valid under Section 5, warrants review by this Court.

II. THE RECURRING FEDERAL QUESTION RAISED BY THE SEVENTH CIRCUIT'S DECISION IS A SUBSTANTIAL QUESTION THAT THIS COURT SHOULD REVIEW AND RESOLVE.

Besides raising an issue that implicates a split of authority, this Petition addresses a substantial federal question of vital importance to every State, that recurs frequently; a fact that, by itself, supports this Court's review. The question raised by this Petition concerns the proper respect and dignity due the States under the Eleventh Amendment versus Congress' authority to enact legislation under Section 5 of the Fourteenth Amendment; an issue this Court has recognized as being sufficiently important to merit its review. *See Alden v. Maine*, 527 U.S. 706, 712 (1999) (granting certiorari to resolve a split between the Maine and Arkansas Supreme Courts concerning the "importan[t]" question of State sovereign immunity); *Fitzpatrick*, 427 U.S. at 448 (granting certiorari absent a split of authority where the question presented concerned the "important constitutional question" of Congress' authority under Section 5).

The issue is significant to the States within the Seventh Circuit on a practical level as well. These States, which include Illinois, Wisconsin and Indiana, have thousands of State employees who, under the Seventh Circuit's decision, will continue to instigate litigation for money damages in federal court against their State employers. Such litigation will continue to both undercut the careful balance between federal and state power established by the Constitution and unnecessarily drain these States' treasuries. In addition, the Seventh Circuit's decision places an unconstitutional burden on these States' hiring and firing practices. In light of the continuing threats to these States and the continuing substantial practical costs the Seventh

Circuit's decision imposes on these States, this Court should consent to review the substantial federal question presented.

III. THE SEVENTH CIRCUIT ERRED BY REJECTING EXISTING ELEVENTH AMENDMENT JURISPRUDENCE AND MULTIPLE STANDARDS OF EXISTING FOURTEENTH AMENDMENT JURISPRUDENCE.

The Seventh Circuit's decision rejected existing Eleventh Amendment jurisprudence that sovereign States, unlike private citizens, act presumptively, at all times, consistent with the protections guaranteed citizens by the Fourteenth Amendment, including the equal protection clause. The Seventh Circuit's decision, therefore, offended the preeminent purpose of the Eleventh Amendment and enables and perpetuates ongoing, impermissible, constitutional affronts to the States, as sovereign entities. The Seventh Circuit's decision also discarded the standards established by existing Fourteenth Amendment Section 5 jurisprudence that require Congress, when exercising its Section 5 power as against sovereign States, to overcome the presumptively constitutional activities of the States by plainly demonstrating with explicit findings in its legislative record that the targeted unconstitutional activities engaged in by the States were so egregious as to constitute a widespread pattern. The Seventh Circuit's decision was also dismissive of existing Fourteenth Amendment Section 5 jurisprudence that establishes a specific standard as to the quantum and quality of the evidence required to be adduced by Congress in the legislative record to support the legislative enactment that purports to abrogate the States' Eleventh Amendment sovereign immunity.

A. THE SEVENTH CIRCUIT'S DECISION OFFENDED THE PREEMINENT PURPOSE OF THE ELEVENTH AMENDMENT AND ENABLES AND PERPETUATES ONGOING, IMPERMISSIBLE, CONSTITUTIONAL AFFRONTS TO THE STATES, AS SOVEREIGN ENTITIES.

Sovereign States, unlike private citizens, act presumptively, at all times, in accordance with the protections afforded citizens by the Fourteenth Amendment. This Court's sovereign immunity jurisprudence, including its Eleventh Amendment jurisprudence, envisions such a presumption in favor of sovereign States. The Supreme Court has held continuously that Congress' authority is limited, that true power belongs to the States and their legislatures within their proper spheres and upon all persons and property within their territorial limits, and that the States must have their own independent and sovereign judgment on most, if not all, important social policy issues and the judicial remedies relevant thereto. The Court has struck down federal statutes outlawing gun possession near schools, *United States v. Lopez*, 514 U.S. 549 (1995); requiring local police to conduct background checks on firearm purchasers, *Printz v. United States*, 521 U.S. 898 (1997); enabling Indian Tribes to sue States for failing to negotiate agreements in good faith for the establishment of casinos on reservations, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1966); enabling rape victims to sue their attackers, *United States v. Morrison*, 529 U.S. 598 (2000); permitting state workers to sue their state employers for age discrimination, *Kimel*, 528 U.S. 62; permitting state workers to sue their state employers for acts of discrimination based on disability, *Garrett*, 531 U.S. 356; and permitting the Federal Maritime Commission to adjudicate a private party's complaint against a non-consenting State. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864 (2002).

Moreover, this Court's jurisprudence has made eminently clear the origins, design, scope, purpose and importance of the States' sovereign immunity. The Court has stated that the origins of States' sovereignty began with the wisdom of the founding generation of our nation. Specifically, the Court stated "the founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.' " *Federal Maritime*, 535 U.S. at __, 122 S. Ct. at 1874. *See also Alden*, 527 U.S. at 748; *In re Ayers*, 123 U.S. 443, 505 (1887). The Court has instructed generations of Americans that the nature and design of the States' sovereignty was and is grounded in an innovative and unique duality of government. *See e.g.*, *Printz*, 521 U.S. at 920, asserting that:

> the framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states. The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other – a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Dual sovereignty is a defining feature of our nation's constitutional blueprint. *See Federal Maritime*, 535 U.S. at __, 122 S. Ct. at 1879.

Further, the Court has described perceptively the scope of the States' sovereignty immunity to be broader and more fundamental than even the express provisions of the Eleventh Amendment. *See e.g.*, *Federal Maritime*, 535 U.S. at __,

122 S. Ct. at 1871 (stating that, "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity . . . this court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.") The Court has also emphasized the purpose and importance of the States' sovereign immunity. Justice Thomas, speaking for the majority in *Federal Maritime*, affirmed the Court's historical view that the preeminent purpose of State sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. *Federal Maritime*, 535 U.S. at __, 122 S. Ct. at 1874. "While State sovereign immunity serves the important function of shielding state treasuries and thus preserving the 'States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns." *Federal Maritime*, 535 U.S. at __, 122 S. Ct. at 1877. Justice Thomas also reiterated the Court's historical view of the vital importance of safe-guarding the States' sovereign immunity, when he concluded:

> While some might complain that our system of dual sovereignty is not a model of administrative convenience, that is not its purpose. Rather, the constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. (internal citations omitted). By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to reduce the risk of tyranny and abuse from either front." (internal citation omitted).

Id. at 1879.

Additionally, Eleventh Amendment jurisprudence has always treated States differently from private citizens and has established entirely different standards for Congress to utilize when attempting to legislate the conduct of States. Each State is a sovereign entity in our federal system. *Florida Prepaid*, 527 U.S. at 634. A private citizen is not. A State by its nature as a sovereign, is not amenable to suit by an individual without its consent. *Id.* A private citizen is. For over a century, the Supreme Court has reaffirmed that federal jurisdiction over suits against non-consenting States was not contemplated by the Constitution when establishing the judicial power of the United States. *Id.* at 634-635. This is not true as to private citizens.

Finally, Justices Kennedy and O'Connor in their concurring opinion in *Garrett* plainly established in the context of the States' Eleventh Amendment immunity, vis a vis Congress' enactment of the ADA, that the States act presumptively consistent with the protections afforded private citizens by Section 1 of the Fourteenth Amendment.

> It is a question of quite a different order, however, to say that the States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy. States can, and do, stand apart from the citizenry. States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand. The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and

> intentional action required to make out a violation of the Equal Protection Clause.

Garrett, 531 U.S. at 375.

The Seventh Circuit in its analysis of Congress' enactment of the 1972 Amendments ignored and rejected this Court's existing Eleventh Amendment jurisprudence when it failed to accept and acknowledge that States, at all times, are presumed to act in accordance with the Section 1 protections of the Fourteenth Amendment, including the equal protection clause. The Seventh Circuit's decision treated the State of Illinois as if it were a private citizen and not a sovereign entity. It began its analysis without a starting point as to the State's status as a sovereign entity and failed to recognize in its opinion the origins, nature, scope, purpose and importance of the State's sovereign immunity. The Seventh Circuit also pointedly discarded this Court's plain observations in *Garrett* that States, at all times, act presumptively in a constitutionally acceptable manner ready to take instruction and to enact laws when their citizens so demand, *Garrett*, 531 U.S. at 375, such as, in the case *sub judice* of the Illinois Human Rights Act. 775 ILCS 5/1-101 *et seq.*

Furthermore, the Seventh Circuit's decision as to Congress' enactment of the 1972 Amendments began and ended with the simple vanilla analysis and conclusion that because in 1972 the protections legislated in the 1972 Amendments were co-extensive with the protections of Section 1 of the Fourteenth Amendment, the legislation was *ipso facto* remedial in nature and that, therefore, legitimate and appropriate abrogation, *without more*, occurred. Not only did the Seventh Circuit wholly fail to explain how such an event could be logically or reasonably justified as automatically occurring in 1972, but not in 1964, when the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, was originally enacted, (i.e., when the States were expressly excluded from coverage precisely because of the Eleventh Amendment immunity), but it failed to explain how such a vanilla comparison

overcame the presumption that, notwithstanding such symmetry, the States were at all times continuing to act in accordance with the protections guaranteed by Section 1 of the Fourteenth Amendment. The Seventh Circuit's analysis plainly assumed the exact opposite. The court assumed that States acted contrary to the protections afforded by Section 1 of the Fourteenth Amendment. The Seventh Circuit made the impermissible leap contrary to existing Eleventh Amendment jurisprudence that the States are at all times assumed to engage in the targeted unconstitutional behavior. In its rush to uphold popular federal social legislation, the Seventh Circuit ignored the presumption, not afforded to private citizens, that as sovereign entities the States must be deemed to act in conformity with the Fourteenth Amendment absent concrete explicit evidence in the legislative record to the contrary. The Seventh Circuit thereby facilitated continued assaults against the dignity of the States as sovereign entities, ignored the sacred compact by which all citizens agreed to be governed, and at the same time undermined the very constitutional framework that permits social problems such as discrimination to be peacefully resolved.

B. THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH MULTIPLE STANDARDS OF EXISTING FOURTEENTH AMENDMENT JURISPRUDENCE.

In holding that the 1972 Amendments to Title VII were appropriate remedial legislation under Section 5, the Seventh Circuit erred in several respects. First, the Seventh Circuit rejected the two step methodology required by existing Fourteenth Amendment jurisprudence when applying the "congruence and proportionality test" to the legislative enactments under scrutiny. Second, the Seventh Circuit expressly rejected the standards established by Section 5 jurisprudence relating to the critical requirement of explicit legislative findings of unconstitutional behavior by the States. Third, the Seventh Circuit failed to apply the proper standard established by Section

5 jurisprudence as to the nature, quality and quantum of the evidence required to be adduced by Congress when abrogating the States' sovereign immunity.

First, as a threshold matter, it is clear from this Court's prior decisions that the 1972 Amendments to Title VII exceed Congress' Section 5 remedial power. Under *City of Boerne*, a federal statute is appropriate remedial legislation if it (i) is aimed at remedying state action that violates Section 1 of the Fourteenth Amendment, and (ii) is proportional and congruent to that purpose. 521 U.S. at 529-534. A statute is *not* aimed at preventing unconstitutional state conduct, however, if Congress fails to identify a "pattern" of such conduct in the act's legislative history. *Florida Prepaid*, 527 U.S. at 640-647; *Garrett*, 531 U.S. at 368-374. Legislation is *not* congruent and proportional if it applies to all States instead of just those States acting unconstitutionally. *See Morrison*, 529 U.S. at 626-27. The 1972 Amendments to Title VII fail to meet these requirements. The Seventh Circuit in applying the "congruence and proportionality test" to Congress' enactment of the 1972 Amendments did not seriously attempt to identify the unconstitutional discriminatory practices by the States that needed to be remedied as required by *City of Boerne*, *Kimel*, *Morrison* and *Garrett*. Further, had the court attempted to make the inquiry, it could not have identified any such pattern of unconstitutional State practices.

There is *no* evidence in the legislative history of the 1972 Amendments indicating that States in employment matters treated men, women or persons of a particular national origin or religious affiliation in an intentionally discriminatory manner. In fact, this Court has plainly noted the "bizarre path by which 'sex' [originally in 1964] came to be included in Title VII as a forbidden criterion for employment – it was included in an attempt to defeat the bill." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989), citing *C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act*,

115-117 (1985). Moreover, even the United States of America in its brief before this Court in *Nevada Dep't of Human Resources v. Hibbs* admitted that the legislative record supporting the extension of Title VII to the States in 1972 "*contains no specific data or findings regarding women employees in state or local governments*" and "*congressional hearings on the 1972 Amendments also were silent on the subject of unconstitutional gender discrimination by State governments*" (emphasis supplied). *Hibbs*, 2001 U.S. Briefs 1368 at *29 (October 25, 2002) (No. 01-1368).

Additionally, there were only two reports referred to in the legislative record to support Congress' findings of irrational race or color discrimination in employment among the States. The first report was prepared by the U.S. Civil Rights Commission entitled, *For All the People By All the People* (1969), and statistically analyzed percentage disparities of black/non-black employees hired among the States. The second report, also prepared by the Commission, was entitled, *Mexican Americans And The Administration Of Justice In The Southwest* (1970), and analyzed disparate treatment of Mexican Americans by law enforcement in the five States of Arizona, California, Colorado, New Mexico and Texas. The contents of these reports do not identify the required widespread history or pattern of Black and Mexican American employment discrimination practices among the States demanded by the *Garrett* standard. *See Garrett*, 531 U.S. at 368-374. No discriminatory employment practices other than hiring practices were shown to have been engaged in by the States and there were zero legislative findings of purported unconstitutional discriminatory employment practices by the States in respect to compensation, terms, conditions or privileges of employment.

It makes no sense, therefore, for the Seventh Circuit to proclaim that the 1972 Amendments to Title VII constitute remedial legislation as to the States' unconstitutional conduct where it made no attempt to identify such conduct and where

Congress had no knowledge or evidence before it (in its legislative record) that demonstrated what unconstitutional conduct was, in fact, engaged in by the States, and indeed by which States. Remedial legislation must always be a response to precisely identified *actual* unconstitutional activities by the States (*City of Boerne*, 521 U.S. at 530-531; *Florida Prepaid*, 527 U.S. at 640-647; *Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 368-374; *Morrison*, 529 U.S. at 626-627), conduct plainly not seriously inquired about by the Seventh Circuit and not demonstrated by Congress in respect to its enactment of the 1972 Amendments.

Second, well established Fourteenth Amendment Section 5 jurisprudence requires Congress, when attempting to abrogate the States' sovereign immunity, to make explicit findings in its legislative record that the States engaged in a widespread pattern of the targeted unconstitutional behavior. *City of Boerne*, 521 U.S. at 530-531; *Florida Prepaid*, 527 U.S. at 640-647; *Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 368-374.

The Seventh Circuit expressly rejected this standard in its analysis of Congress' enactment of the 1972 Amendments extending coverage of its substantive provisions to sovereign States. As in previous decisions upholding the Equal Pay Act against an Eleventh Amendment challenge, the Seventh Circuit expressly rejected the view that explicit legislative findings were a necessary element of the Section 5 inquiry. *Varner*, 226 F.3d at 935; *Cherry*, 265 F.3d at 549; *Nanda*, 303 F.3d at 827-828; App. A at 20a. The Seventh Circuit attempted to justify its rejection of the established standard by stating that in *City of Boerne* the Court stated that lack of a legislative record was "not dispositive", *Nanda*, 303 F.3d at 824; App. A at 13a, and that in *Florida Prepaid* and *Kimel*, this Court stated that lack of support in the legislative record was "not determinative." *Nanda*, 303 F.3d at 826; App. A at 16a. But in *City of Boerne*, *Florida Prepaid* and *Kimel*, unlike the enactment of the 1972 Amendments to Title VII, there were sound reasons independent

of legislative findings as to the States' conduct as to why the challenged sections of the RFRA, the Patent Remedy Act and the ADEA were held not to be remedial and that the legislative findings were "not determinative." In each of those Acts, the very purpose and scope of the sections under scrutiny implicated so much constitutional conduct by the states that it became readily apparent that the purported statutory remedies were not congruent and proportional to that conduct. In those instances the legislative findings were held to be non determinative and confirmnatory in nature. The 1972 Amendments to Title VII, however, implicate only unconstitutional, irrational, discriminatory practices and explicit legislative findings that the states engaged in this targeted unconstitutional behavior was absolutely essential to the Section 5 inquiry.

The Seventh Circuit also was dismissive of the findings in *Garrett* modifying the Court's previous statements in *City of Boerne* and *Kimel* that ". . . lack of support [in the legislative record] is not determinative of the inquiry . . ." and is merely confirmatory in nature. *City of Boerne*, 521 U.S. at 531; *Kimel*, 528 U.S. at 91. Justice Rehnquist, speaking for the majority of the Court, stated:

> Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the states, there *must* be a pattern of discrimination by the states which violates the Fourteenth Amendment, and the remedy imposed by Congress *must* be congruent and proportional to the targeted violation [Emphasis supplied].

Garrett, 531 U.S. at 374. "Must" is determinative. Must is not optional; it is obligatory, necessary, compulsory and mandatory. The Seventh Circuit gave no credence to the fact that Justice O'Connor, the author of the *Kimel* decision, joined in the concurring opinion of Justice Kennedy in *Garrett*, wherein he

unequivocally and expressly stated, directly contrary to the earlier statement in *Kimel*, that:

> The *predicate* for money damages against an unconsenting state in suits brought by private persons *must* be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the state in its official capacity. [Emphasis supplied].

Garrett, 531 U.S. at 376 (Kennedy, J. concurring). Again, "must" is determinative. "Predicate" is not confirmative, it is antecedent. "Predicate" leaves no room for equivocation as to the necessity of a prior finding. The Seventh Circuit expressly rejected the plain, unambiguous and unequivocal conclusion in *Garrett* that a documentation of patterns of constitutional violations committed by the States is a "*conditio sine qua non*" to a finding that the enactment *sub judice* is remedial in nature. The Seventh Circuit also was dismissive of the fact that in the *Garrett* opinion, the extent and intensity of the contentions and debate between and among *all* of the Justices focused primarily upon the issue of the necessity, quality and quantum of evidential findings required to be placed by Congress in the relevant legislative record to justify the congressional exercise of its Section 5 power in abrogating the States' Eleventh Amendment immunity; that not one Justice ever asserted that the legislative findings were not determinative of the inquiry, an assertion that would have effectively ended the debate; and, that all of the Justices plainly considered the issue determinative of the inquiry.

Third, the Seventh Circuit's decision was wholly dismissive of the standards established by the *City of Boerne* and *Kimel* courts, and especially the *Garrett* court as to the quantum and quality of the evidence as to the States' unconstitutional conduct required to be demonstrated in the legislative record. With respect to the 1972 enactment extending Title VII coverage to the States, it was critically essential under

the *Garrett* standards for Congress to have demonstrated not only that the States had engaged in inflicting the injuries being examined (*i.e.*, discrimination in employment practices because of an individual's race, color, religion, sex or national origin), but that the States had engaged in a history and pattern of inflicting such injuries. *Garrett*, 531 U.S. at 368-374; *Kimel*, 528 U.S. at 89-91; *City of Boerne*, 521 U.S. at 530-531. Further, according to the *Garrett* Court, because the States' rights to sovereign immunity are constitutionally guaranteed rights, the quantum of proof required of Congress cannot consist of anecdotal accounts, generalizations or conclusory statements that the States had inflicted such injuries upon its citizens. *Garrett*, 531 U.S. at 370-371. Congress must demonstrate a wide-spread practice among the States of inflicting such injuries upon their respective citizens based upon a history and pattern of *actual* instances of first hand evidentially trustworthy accounts of such injuries, and Congress is required to do so in the legislative record supporting the congressional enactment. *Garrett*, 531 U.S. at 368-374.

The Seventh Circuit's decision not only failed to apply the "widespread pattern" standard and the "first hand evidentially trustworthy accounts" standard established by *Garrett*, it did not even refer to them. Instead, in respect to the legislative record of the 1972 Amendments to Title VII, the Seventh Circuit's decision, ". . . that Congress was responding to a pattern of discrimination by the states", was based upon (i) four pages of the legislative record, (ii) a 1970 report by the U.S. Civil Rights Commission entitled, *Mexican Americans and the Administration of Justice in the Southwest*, referred to in the legislative record, (iii) a 1969 report by the same Commission entitled, *For All the People By All the People*, also referred to in the legislative record, and (iv) purported "statistical evidence" bolstering Congress' view of discrimination against women workers. *Nanda*, 303 F. 3d at 830-831; App. A at 27a. Taken singularly or in concert, these items relied upon by the Seventh Circuit confirm its disregard of the *Garrett* and *Morrison*

standards and the fact that the court paid only lip service to existing Fourteenth Amendment jurisprudence.

First, the four pages (out of approximately 4000 pages) of legislative record referred to by the Seventh Circuit did not contain one direct first-hand account of an employment discrimination practice by a State, much less the wide-spread pattern required by *Garrett*. *Garrett*, 531 U.S. at 368-374.

Second, the 1970 report by the U.S. Civil Rights Commission entitled, *Mexican Americans and the Administration of Justice in the Southwest*, relied on by the Seventh Circuit, dealt solely with discriminatory law enforcement practices, not discriminatory employment practices; related only to Mexican Americans, not other minorities, and portrayed only five States out of fifty and, then, only in one region of the country. The Commission found that law enforcement would treat Mexican Americans more fairly if more Mexican Americans were employed in law enforcement positions. The Report did not describe one direct first-hand account of an employment discrimination activity by a State, much less evidence of a wide-spread pattern of unconstitutional offenses engaged in by the States.

Third, the 1969 report by the Commission, entitled, *For All the People By All the People*, merely documented through surveys the number and types of jobs held by minorities in just seven metropolitan centers (of hundreds) in the country, statistically contrasting those numbers against the relevant minority's percentage make-up of the relevant geographical population. Further, only two examples of discriminatory actions by the States where in fact described in the report. The first example was a Louisiana Highway Department incident involving a segregated bathroom. That incident, however, was founded, in part, upon anecdotal evidence and, in part, upon anonymous evidence, the specific type of evidence expressly rejected under the standards of *Garrett*. *Garrett*, 531 U.S. at

370-372. The second example was a Georgia Highway Department incident, the *only* first-hand account in the report of a discriminatory employment practice by a State, the account of which also falls far short of the *Garrett* standards. *Garrett*, 531 U.S. at 370.

Fourth, as to the reference by the Seventh Circuit to the statistical evidence purportedly bolstering Congress' view as to discrimination against women workers by States, there is not one instance related in that part of the legislative record that would implicate the States. As plainly stated in *Garrett*, it is not meaningful to argue as to the Title VII prohibitions that the powerful evidence of discriminatory treatment throughout society in general implicates State governments as well; or, that there is no reason to believe that the States are immune from the "stereotypic assumptions" and pattern of "purposeful unequal treatment" that Congress found to be prevalent in society; or, that Supreme Court decisions prior to *Kimel* and *Garrett* did not traditionally require Congress to make findings as to state discrimination or to break down the record evidence "category by category." All of these arguments were forcefully presented in the *Garrett* dissent and rejected. *Garrett*, 531 U.S. at 370-373.

Finally, the Seventh Circuit not only was dismissive of the *Garrett* standards in its analysis of the legislative record, it judicially created its own legislative record for Congress. The Seventh Circuit stated that Congress somehow relied upon the purported knowledge it had garnered through the passage of other federal legislation together with Congress' purported knowledge of the history of gender and race discrimination in the nation embodied in the Supreme Court's jurisprudence. *Nanda*, 303 F.3d at 830-831; App. A at 27a. But the fact is that there is not even one oblique reference in the legislative record of the 1972 Amendments of Title VII to either the enactment of other legislation and knowledge about States' activities purportedly resulting therefrom, or to race and gender

discriminatory employment practices among the States embodied in Supreme Court jurisprudence. The Seventh Circuit's speculation that Congress relied upon these types of knowledge external to the legislative record is plainly violative of the Section 5 jurisprudence laid down in *Garrett*. As Justice Rehnquist stated in *Garrett* when discarding from consideration Justice Breyer's Appendix C "host of incidents": ". . . [H]ad Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings." *Garrett*, 531 U.S. at 371.

It is plain from all of the foregoing considerations that the Seventh Circuit under existing Section 5 jurisprudence (i) failed to properly apply the "congruence and proportionality test" to the 1972 Amendments to Title VII; (ii) plainly rejected the *Florida Prepaid* and *Kimel* standards, and especially the *Garrett* standard that explicit findings of the targeted unconstitutional behavior by the States be adduced in the legislative record as a "*conditio sine qua non*" to a determination that enactment was remedial in nature; and (iii) was wholly dismissive of existing Section 5 jurisprudence as to the standard of the quantum and quality of that evidence required in the legislative record of any enactment attempting to abrogate the States' sovereign immunity. For these reasons, the Seventh Circuit's decision was in error and should be reviewed by this Court.

CONCLUSION

The Seventh Circuit's decision in respect to Congress' attempt to abrogate the States' Eleventh Amendment immunity by its enactment of the 1972 Amendments to Title VII rejected the fundamental notion established in both Eleventh and Fourteenth Amendment jurisprudence that the sovereign immunity of States, carefully designed into the governance pact by which all citizens have consented to be governed, was intended to and must always "trump" any congressional act that would threaten or effect that aspect of the design, unless there is first plainly demonstrated, with trustworthy first-hand evidence in the record of that congressional act, a history and widespread pattern of unconstitutional practices by the States. The Petition should be granted, the Seventh Circuit's decision should be reviewed by the Court, and the Court should hear arguments on the substantial federal question presented.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED SEPTEMBER 17, 2002

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 01-3448

NAVREET NANDA,

Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, GERALD MOSS, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 4757—**Rebecca R. Pallmeyer,** *Judge.*

ARGUED APRIL 4, 2002—DECIDED SEPTEMBER 17, 2002

Before RIPPLE, KANNE and EVANS, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Navreet Nanda, Ph.D., brought this discrimination action against her former employer, the Board of Trustees of the University of Illinois, as well as her former supervisors and colleagues at the University (collectively "the University"). The University moved to

dismiss Dr. Nanda's complaint, principally on the basis that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), did not validly abrogate the State's sovereign immunity under the Eleventh Amendment. The district court rejected this argument and held that Congress validly abrogated Eleventh Amendment immunity when it extended Title VII to the States. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

Dr. Nanda was employed as an assistant professor in the Department of Microbiology at the University's Chicago campus. In July 1998, Bellur Prabhakar, the Chairman of the Department of Microbiology and Immunology, recommended to the University that Dr. Nanda be issued a terminal contract that would end, at its expiration, her employment with the University. The University accepted Dr. Prabhakar's recommendation and issued Dr. Nanda a terminal contract ending on August 31, 1999. Dr. Nanda's efforts to reverse the decision through the University's grievance process were unsuccessful. After exhausting her administrative remedies, Dr. Nanda filed this action in district court.

Dr. Nanda's complaint included three counts. In Count I, Dr. Nanda alleged that she had suffered harassment and that her employment had been terminated on the basis of her sex, race and national origin in violation of Title VII. Count II of

Appendix A

Dr. Nanda's complaint set forth a parallel claim under 42 U.S.C. §§ 1983 and 1988 for violations of her equal protection rights and sought injunctive relief, compensatory damages and punitive damages against the University as an institution and also her supervisors for violations of her equal protection rights. Finally, Count III, a state tort law claim, alleged that Dr. Prabhakar had interfered intentionally with Dr. Nanda's employment relationship with the University.

The University timely moved to dismiss Dr. Nanda's complaint. With respect to Count I, the University maintained that Congress did not abrogate properly the States' sovereign immunity under the Eleventh Amendment when it enacted the Equal Employment Act of 1972 (the "1972 Act") which extended Title VII's coverage to the States. The individual defendants and the University moved to dismiss Count II on the ground that the named administrators were not "persons" within the meaning of 42 U.S.C. § 1983. Finally, Dr. Prabhakar moved to dismiss Count III on the ground that the pleaded state cause of action was preempted by a state statutory cause of action.

In her response, Dr. Nanda submitted that Congress had the authority to extend Title VII to the States pursuant to § 5 of the Fourteenth Amendment. Specifically, Dr. Nanda claimed that Title VII passed the "congruence and proportionality" test articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. According to Dr. Nanda, "Title VII does *not* raise the level of scrutiny given to race, national origin and gender classifications beyond that granted in the Equal Protection Clause and, therefore, Title VII is congruent with the Equal Protection Clause." R.58 at 5.

Furthermore, Dr. Nanda pointed to the historical problems of race and gender discrimination, and to specific evidence of discrimination against women in institutions of higher education, to establish that Congress' response to the problem of gender discrimination was proportionate. *See id.* at 6-8.

With respect to Count II, Dr. Nanda contended that Count II of her complaint stated a claim under § 1983 because it alleged deliberate conduct for which she sought punitive damages and because she sought injunctive relief which "may be granted under § 1983 without violating the Eleventh Amendment." *Id.* at 10. Finally, Dr. Nanda maintained that her allegations against Dr. Prabhakar in Count III were distinguishable from her allegations of civil rights violations made in the first two counts, and, therefore, that count should be considered independent of those violations under Illinois tort law.

B. District Court Opinion

After considering the arguments of the parties, the district court granted in part and denied in part the University's motion. The district court acknowledged that, in several recent cases, the Supreme Court had held that Congress had encroached on the States' Eleventh Amendment immunity. However, with respect to whether Congress had abrogated properly the States' Eleventh Amendment immunity in enacting the 1972 Act, the court determined that it was not "writ[ing] on a clean slate." R.79 at 3.

The district court began its analysis by stating that "[i]n *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976), the Supreme

Court concluded that in the 1972 Amendment to Title VII of the Civil Rights Act of 1964, 'Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages . . . against a state government. . . .' " R.79 at 3. Since that time, the court continued, numerous courts of appeals had permitted Title VII claims for damages against the States. The district court specifically mentioned and followed the decision of the Eighth Circuit in *Okruhlik v. University of Arkansas ex rel. May*, 255 F.3d 615 (8th Cir. 2001). In that case, the Eighth Circuit concluded that Congress validly had abrogated the States' Eleventh Amendment immunity when it extended Title VII to the States. The district court, "persuaded by *Okruhlik* and the authorities cited therein, conclude[d] that it may, consistent with the Constitution, exercise jurisdiction over Professor Nanda's Title VII claims." R.79 at 6. It therefore denied the University's motion to dismiss Count I.

With respect to Count II, the district court held that, by virtue of the Supreme Court's decision in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), "a lawsuit under § 1983 against state officials constitutes a suit against the State itself, and that neither a State nor its officials acting in their official capacities are 'persons' under § 1983 for purposes of damage awards." R.79 at 7. Consequently, the district court dismissed Dr. Nanda's claims for damages. However, because "the Court acknowledged in *Will* that a claim for injunctive relief may properly be brought against state officials," the district court allowed Dr. Nanda's claim for injunctive relief to go forward. *Id.*

Finally, the district court determined that Dr. Nanda's claim for intentional interference with contract contained in Count III was linked inextricably with the allegations that Dr. Prabhakar's actions were motived by sex, race and national origin. Therefore, the Illinois Human Rights Act provided the exclusive remedy for the alleged conduct and preempted Dr. Nanda's state tort claim. The court therefore granted Dr. Prabhakar's motion to dismiss Count III.

The University timely appealed the district court's denial of its motion to dismiss Counts I and II.[1]

II

DISCUSSION

A. Eleventh Amendment Immunity

Under 28 U.S.C. § 1291, this court has jurisdiction only from "final decisions" of the district courts. *See* 28 U.S.C. § 1291; *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 546 (7th Cir. 2001). This court has held that a district court's denial of a motion to dismiss is not a final decision. *See United States v. Michelle's Lounge*, 39 F.3d 684, 702 (7th Cir. 1994) ("Ordinarily, of course, a denial of a motion to dismiss is not a final order."). However, the collateral order doctrine provides a "narrow" exception to the finality rule. This doctrine permits an appeal from a non- final judgment, such as the denial of a motion to dismiss, when the following

1. Dr. Nanda did not cross-appeal the district court's dismissal of Count III, and no arguments concerning Count III are before this court.

criteria are met: (1) the order "conclusively determine[s] a disputed question"; (2) the order "resolve[s] an important issue completely separate from the merits of the action"; and (3) the order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). It is well-settled that the issue of Eleventh Amendment immunity, which encompasses both immunity from liability as well as immunity from suit, is "irretrievably lost" if not immediately appealable and therefore is properly raised in a collateral appeal. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) ("We hold that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity."). Thus, we have jurisdiction to review the district court's denial of Eleventh Amendment immunity.

We review a district court's decision to dismiss a claim on Eleventh Amendment immunity grounds de novo. *See Cherry*, 265 F.3d at 547. The University urges us to reverse the district court's decision on the Eleventh Amendment issue and reiteates many of the arguments that it made in support of its motion to dismiss. Specifically, the University contends that, when the Supreme Court handed down its most recent Eleventh Amendment case, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court established a higher bar for congressional abrogation of the States' Eleventh Amendment immunity. In the University's view, in order to abrogate properly Eleventh Amendment immunity, a Congressional enactment must not only pass the "congruence and proportionality" test, but also must be

supported by clear evidence of past constitutional violations set forth in the legislative record. The district court, continues the University, paid only lip service to this second requirement. The University contends that, because the legislative record does not reveal a pattern of past constitutional wrongs to support the extension of Title VII to the States, Title VII cannot survive an Eleventh Amendment challenge.

Dr. Nanda, and the United States as intervenor, argue the opposite. According to these parties, federal courts only have to look for a legislative record of constitutional violations if the congressional action fails the "congruence and proportionality" test. In their view, because Title VII proscribes only unconstitutional behavior, the district court did not have to examine the legislative record for a history of constitutional violations. In the alternative, Dr. Nanda and the United States maintain that, if courts have to examine the legislative record to assess the need for congressional action, there is ample evidence in the record to justify the extension of Title VII to the States.[2]

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2. The United States argues that *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), disposes of the issue currently before this court. In *Fitzpatrick*, the Court determined that Congress, as part of its powers under § 5 of the Fourteenth Amendment, may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456. Although many courts, including our own, *see Merheb v. Ill. State Toll Highway Auth.*, 267 F.3d 710, 711 (7th Cir. 2001) (citing *Fitzpatrick* for proposition that "there is no Eleventh Amendment immunity to suits under Title VII"); *Love v. Waukesha Joint Sch. Dist. # 1, Bd. of Educ.*, 560 F.2d 285 (7th Cir. 1977), took *Fitzpatrick* to resolve all Eleventh Amendment challenges to Title VII, the decision did hold open the possibility

(Cont'd)

Appendix A

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.[3] A state's immunity, however, is not absolute; "Congress may abrogate the State's Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Garrett*, 531 U.S. at 363 (internal quotation marks and citations

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(Cont'd)

of an Eleventh Amendment challenge to Title VII based on Congress' authority under § 5 of the Fourteenth Amendment; it stated: "Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment." *Fitzpatrick*, 427 U.S. at 456 n.11. The combination of this possibility with the detailed Eleventh Amendment analysis the Court has employed in recent cases suggests to us that the most prudent course is to assume that neither *Fitzpatrick* nor our earlier summary treatment of the issue through reliance on *Fitzpatrick* necessarily disposes of the issue currently before us.

3. Although the text of the Amendment does not forbid suits against a State by its own citizens, "the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1871 (2002). Specifically, the Supreme Court "has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (citing cases).

omitted).[4] The Supreme Court has recognized that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (internal citations omitted). Congress, therefore, "may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power." *Garrett*, 531 U.S. at 364. We must ascertain, therefore, what constitutes a valid exercise of § 5 power to determine if Congress' extension of Title VII to the States falls within that grant of authority.

The Fourteenth Amendment states, in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
>
> . . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV. Section 5 of the Fourteenth Amendment gives to Congress the right to "enforce the

4. The University does not dispute that Congress unequivocally intended to abrogate the States' Eleventh Amendment immunity when it passed the 1972 Act.

substantive guarantees contained in § 1 by enacting 'appropriate legislation.' " *Garrett*, 531 U.S. at 365. This Congressional determination of necessity and propriety is "entitled to much deference." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Nevertheless, Congress' power is limited to enforcement; the Fourteenth Amendment does not give Congress the power "to determine what constitutes a constitutional violation," *City of Boerne*, 521 U.S. at 519, a responsibility reserved to the Court, *see Garrett*, 531 U.S. at 365.

A review of the Supreme Court's § 5 jurisprudence and our own court's implementation of these principles is helpful in drawing this distinction between enforcing and redefining the protections of the Fourteenth Amendment.

1. Supreme Court Precedent

Through a recent line of cases, the Court has articulated what constitutes a proper exercise of the Fourteenth Amendment enforcement power vis a vis the Eleventh Amendment. We begin our review with *City of Boerne v. Flores*.

a. *City of Boerne*

In *City of Boerne*, the Court considered the constitutionality of the Religious Freedom Recovery Act ("RFRA"), specifically whether Congress, in enacting RFRA, properly had exercised its enforcement power under § 5 of the Fourteenth Amendment. The Court first "acknowledge[d] that § 5 is a 'positive grant of legislative power to Congress.' " *Id.* at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. 641,

651 (1966)). "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.' " *Id.* at 518. However broad Congress' power under § 5, the Court continued, it is not unlimited. The Court explained that "[t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* at 519. Congress is limited to "enforcing" the rights guaranteed by the Amendment. *Id.* The Court recognized that

> [w]hile the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Id. at 519-20.

The Court then examined the provisions of RFRA to determine if it was a valid exercise of Congress' § 5 powers. The parties presented RFRA as a measure to "prevent[ ] and remed[y] laws which are enacted with the unconstitutional object of targeting religious beliefs and practices." *Id.* at 529. The Court stated that "[t]he appropriateness of remedial

measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). According to the Court, RFRA's legislative record lacked examples of instances in which laws of general applicability were enacted by the States for the purpose of inflicting religious discrimination. Rather, congressional hearings had focused on laws of general applicability that placed only incidental burdens on religion. The lack of a legislative record, however, was not dispositive. The Court stated that

> [r]egardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.

Id. at 532. Consequently, RFRA could not stand in the face of the Eleventh Amendment challenge.

b. *Florida Prepaid*

The Court next addressed the interplay of the Eleventh and Fourteenth Amendments in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). In that case, the Court addressed an Eleventh Amendment challenge to the Patent and Plant Variety Protection Remedy Clarification Act (the "Patent Remedy

Act"), which allowed patent holders to pursue infringement actions against the States. In assessing the validity of the congressional action, the Court reiterated the requirements of congruence and proportionality established in *City of Boerne*.

> We . . . held that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.
>
> RFRA failed to meet this test because there was little support in the record for the concerns that animated the law.

Id. at 639.

Following this course, the Court first identified the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy" 'with reference to the historical experience . . . it reflects.' " *Id.* at 639-40 (quoting *City of Boerne*, 521 U.S. at 525). In *Florida Prepaid*, as in *City of Boerne*, the Court was unable to identify a pattern of constitutional wrongs by the States against patent holders. The Court went on to state that, although the "lack of support in the legislative record is not determinative," *id.* at 646, identifying and assessing "the wrong or evil is still a critical part of our § 5 calculus because '[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one,' " *id.* (quoting *City of Boerne*, 521 U.S. at 530). When there is little evidence of constitutional harm in the legislative

record, the means of combatting the feared unconstitutional action must be tailored to address clear constitutional violations. Because the Patent Remedy Act offended this principle of proportionality, the Court held that it was not a valid exercise of Congress' § 5 powers.

c. *Kimel*

The Age Discrimination in Employment Act was the next Congressional enactment to meet with an Eleventh Amendment challenge. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court addressed the issue of whether Congress validly abrogated Eleventh Amendment immunity in the ADEA. The Court reiterated the breadth of congressional power pursuant to the Fourteenth Amendment: "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* at 81. However, applying its now-established congruence and proportionality requirements, *see id.* at 82, the Court held that "the ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment." *Id.* at 82-83. Initially, the Court observed that, because age discrimination is subject only to rational basis review under the Equal Protection Clause, only irrational age classifications violate the Constitution. "Judged against the backdrop of our equal protection jurisprudence [on age discrimination]," the Court stated, "it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior.' " *Id.* at 86 (quoting *City*

of Boerne, 521 U.S. at 532). However, "[t]hat the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, d [id] not alone provide the answer to [the] § 5 inquiry." *Id.* at 88. The Court's task was to discern whether the ADEA was proper prophylactic legislation or an attempt by Congress "to substantively redefine the States' legal obligations with respect to age discrimination," and one means to make such a determination was to examine the legislative record. *Id.* To the Court, this review confirmed that Congress' extension of the ADEA to the States "was an unwarranted response to a perhaps inconsequential problem." *Id.* at 89. According to the Court,

> Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.

Id. Looking back to its decision in *City of Boerne*, the Court held that, although this lack of support in the legislative record was not determinative, "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 91. The Court then concluded that, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional

age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment." *Id.*

d. *Garrett*

Finally, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court considered an Eleventh Amendment challenge to the Americans with Disabilities Act ("ADA"). Again, the Court's task was to determine whether the ADA was proper enforcement legislation, as opposed to a usurpation of the Court's responsibility "to define the substance of constitutional guarantees." *Id.* at 365. "Accordingly," stated the Court, "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Id.* (quoting *City of Boerne*, 521 U.S. at 520). The Court's first step in this analysis was to identify the scope of the constitutional right at issue. It noted that the Equal Protection clause affords only rational basis review for disability discrimination. Once the Court determined "the metes and bounds of the constitutional right in question, [it] examine[d] whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled." *Id.* at 368. It noted that "Congress' § 5 authority is appropriately exercised only in response to state transgressions." *Id.* However, the legislative record of the ADA, the Court noted, focused heavily on the private sector. Few examples from the record involved the States, and the Court found it "debatable" whether these incidents evidenced "irrational" state action or merely "an

unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA." *Id.* at 370. However, the Court held that, even if each incident showed unconstitutional action on the part of the State, "these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based," *id.*, and thus the ADA "raise[d] the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*," *id.* at 372. "[I]n order to authorize private individuals to recover money damages against the States," the Court stated, "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 374. With respect to the ADA, those requirements had not been met. *See id.*

Although articulated and ordered slightly differently within each case, we believe that these cases identify several guiding principles that must inform our Eleventh Amendment analysis. First, congressional action taken pursuant to § 5 of the Fourteenth Amendment is not limited to parroting the language of § 1. Section 5 is a positive grant of power, and Congress may enact reasonable prophylactic legislation in the face of constitutional violations.

However, Congress' enforcement power must stop short of redefining the States' substantive obligations under the Fourteenth Amendment. Whether a particular congressional response enforces, as opposed to defines, the States' obligations under § 1 of the Fourteenth Amendment is determined by looking at the scope of the enactment compared with the

constitutional right being protected. If the scope of the remedy is broad, it must be justified by a proportionately pressing need. Finally, although legislative history is not determinative of this inquiry, it is one means—and perhaps the most telling means—of assessing the depth of the constitutional problem and the consequent need for a congressional remedy.

2. Circuit Precedent

This court has applied the principles set forth above in considering two Eleventh Amendment challenges to the Equal Pay Act. In *Varner v. Illinois State University*, 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001), this court followed the analysis set forth by the Supreme Court in *City of Boerne* and its progeny, and first looked at the conduct targeted by the Equal Pay Act. We acknowledged that, in light of the burden-shifting provisions of the Equal Pay Act, "an employer is potentially subject to liability without a showing of discriminatory intent"—a prerequisite for a constitutional violation. *Id.* at 932. However, we noted, based on the Court's rulings, the fact that the Equal Pay Act prohibited some constitutional conduct did not end the inquiry: "The question before us, therefore, is not whether the remedial provisions of the Equal Pay Act prohibit some constitutional conduct. Instead, we must consider whether the Act can be characterized as a proportional and congruent response to the problem of unconstitutional wage discrimination based on gender." *Id.* at 933.

In applying the principles of congruence and proportionality, we noted three distinctions between the Equal Pay Act and the legislative provisions that the Court had struck down. First, the Equal Pay Act was "less indiscriminate in

scope" than those acts, *id.*; it contained exemptions from liability for employers "who can provide a neutral explanation for a disparity in pay," *id.* at 934. Furthermore, the Equal Pay Act addressed a problem—gender discrimination—which was subject to heightened scrutiny under the Constitution. Finally, Congress had gained an historical understanding of the problem of gender discrimination through other legislation. All of these considerations militated against a finding that Congress had acted to redefine the States' obligations under the Equal Protection Clause as opposed to simply enforcing the already stringent requirements on the States.

In upholding the Equal Pay Act against the Eleventh Amendment challenge, we rejected the view that explicit legislative findings were a necessary element of the § 5 inquiry. In *Varner*, the University had urged that, because "the legislative findings underlying the Equal Pay Act address only the problem of discrimination in private industry," there was no record to justify extension of the Equal Pay Act to public employers. *Id.* at 935. We stated:

> Although we recognize that a review of the legislative record can be an instructive means of distinguishing appropriate remedial action from an impermissible substantive change in legal rights, we want to emphasize that a "lack of support [in the legislative record] is not determinative of the § 5 inquiry." This observation is particularly relevant in the context of the Equal Pay Act, where the value of congressional findings is greatly diminished by the fact that the Act prohibits very little constitutional conduct and

> where the historical record clearly demonstrates that gender discrimination is a problem that is national in scope.

Id. (quoting *Kimel*, 528 U.S. at 91; internal citations omitted). Consequently, we determined that subjecting state entities to liability under the Equal Pay Act did not violate the Eleventh Amendment.

Shortly thereafter, we revisited our decision in *Varner* in light of the Supreme Court's decision in *Garrett*. *See Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001). We restated the governing standard as follows:

> Congress can enact legislation to remedy or prevent conduct that violates the Fourteenth Amendment, but Congress cannot redefine or expand the substance of the Fourteenth Amendment itself. Thus there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. This means that Congress must carefully tailor its legislation so that it enforces the Fourteenth Amendment without altering the Amendment's meaning.

Id. at 549 (internal quotation marks and citations omitted). We then examined the scope of the Equal Pay Act to determine whether it was consistent and compatible with the Fourteenth Amendment or whether it expanded the substantive prohibitions of the Amendment by prohibiting more state action than would be unconstitutional. As part of

this analysis, we examined the legislative record to assess whether Congress had identified a pattern of unconstitutional conduct by the States. Noting that the Court had advised that this evidence "is not determinative of the § 5 inquiry," we stated that "[s]uch evidence tends to ensure that Congress' means are appropriate under § 5 when the statute in question pervasively prohibits constitutional State action." *Id.* at 549 (internal quotation marks and citations omitted). We dismissed the argument that *Garrett*

> established a new, bright-line rule that Congress' attempt to abrogate immunity from a federal statute is invalid if the statute lacks specific findings that the States had engaged in a pattern of unconstitutional conduct of the type prohibited by the statute. . . . All *Garrett* does is further demonstrate that the legislative record is an important factor when the statute in question pervasively prohibits constitutional State action.

Id. at 553. Consequently, again we sustained the Equal Pay Act as it applied to the States.

3. Application

As detailed above, in determining whether Congress overstepped its constitutional authority in applying Title VII to the States, we must "identify with some precision the scope of the constitutional right at issue," here the limitations that § 1 of the Fourteenth Amendment places upon States' treatment of women and of ethnic and racial minorities. *Garrett*, 531 U.S. at 365. We explained this level of protection in *Varner*:

> Under the Constitution, gender-based classifications are afforded heightened scrutiny. Once an individual is able to establish the existence of a gender-based distinction, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."

226 F.3d at 934 (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996); internal citations omitted).[5] In the employment context, courts have given effect to this constitutional prohibition by allowing plaintiffs to prove their case using the familiar construct of a prima facie case; this court has stated:

> Although as an original matter it seems odd that the pleading and proof of liability in a case under the Constitution would be the same as in a case under a statute passed in 1964, this is indeed the teaching of an unbroken phalanx of decisions by this and other courts. These cases hold that the issue of liability and the method of proving liability are the same, though only in a disparate-treatment case. . . .

Riordan v. Kempiners, 831 F.2d 690, 695-96 (7th Cir. 1987). Thus, "all that is required to establish prima facie liability, and thus allow the plaintiff to get to the jury, is evidence of a

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5. Racial classifications are subject to strict scrutiny—they must promote a compelling state interest and be narrowly tailored to serve that interest. *See Billings v. Madison Met. Sch. Dist.*, 259 F.3d 807, 815 (7th Cir. 2001).

disparity in treatment[6] between equally qualified workers of different sexes, from which discriminatory intent can be inferred." *Id.* at 695; *see also Johnson v. Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 381 (5th Cir. 1988) ("A plaintiff proceeding on a disparate treatment theory of employment discrimination must show disparate treatment and discriminatory motive. A plaintiff can establish a prima facie case, however, by producing evidence of disparate treatment alone." (internal citations omitted)).

The Supreme Court also has instructed us to evaluate the scope of the congressional action at issue to determine to what extent, if any, the act prohibits conduct allowed by the Constitution. At issue here is the disparate treatment prohibition of Title VII. It states in relevant part:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

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6. The allegations in Dr. Nanda's complaint are limited to claims of intentional discrimination, i.e., disparate treatment. Because Dr. Nanda's claims are disparate treatment claims, and because the University does not contend that Title VII's disparate impact provisions should factor into the Eleventh Amendment calculus, we limit our review to Title VII's disparate treatment provisions. *Cf. In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305 (11th Cir. 1999) (considering Eleventh Amendment challenge to disparate impact provision of Title VII without consideration of the disparate treatment provision).

> terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a). Like the prohibition of the Equal Protection Clause, this language is aimed at intentional discrimination, and "[t]o prove a violation of this provision, a plaintiff must proffer either direct or indirect evidence of the employer's discriminatory intent." *Bennett v. Roberts*, 295 F.3d 687, 694 (7th Cir. 2002). When using the indirect method, the plaintiff establishes a prima facie case of discriminatory intent by showing: (1) that she belongs to a protected category; (2) that she suffered an adverse employment action; (3) that she was meeting her employer's legitimate expectations; and (4) similarly situated individuals not in a protected category were treated more favorably by the employer. *See, e.g., Maarouf v. Walker Mfg. Co.*, 210 F.3d 750, 752 (7th Cir. 2000). Thus, both the aim of Title VII, as well as the method for proving violations of Title VII, are the same as those of the Equal Protection Clause.[7]

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7. Both Dr. Nanda and the Government argue that Title VII does not prohibit any constitutional conduct because the burdens of proof on employers is the same under both the Equal Protection Clause and Title VII. The University responds to this argument accordingly:

(Cont'd)

Appendix A

A review of the standards of the Equal Protection Clause and of Title VII reveals that Title VII "enforces the Fourteenth Amendment without altering its meaning." *Cherry*, 265 F.3d at 549. The fact that Congress was not attempting to "redefine" the Fourteenth Amendment in extending Title VII to the States is also clear from the legislative record. In undertaking a review of the legislative record, we are cognizant of the Court's instruction that "lack of support [in the legislative record] is not determinative of the § 5 inquiry," *Kimel*, 528 U.S. at 91, and we recognize that "the value of congressional findings is greatly diminished" by the fact that the disparate treatment provisions of Title VII prohibit little, if any, constitutional conduct, *Varner*, 226 F.3d at 935.

(Cont'd)

> The substantive provisions of Title VII were enacted *in 1964*, not in 1972, and the States at that time were expressly excluded from coverage because of sovereign immunity. If the court were to accept the argument of Nanda and the United States, the court would be required to conclude that since, *in 1964*, the Title VII protections were identical to the protections of § 1 of the Fourteenth Amendment they were at that time, by definition, congruent and proportional and that, abrogation, without more, occurred. The court would then have to conclude that *in 1964*, Congress, when it enacted Title VII, abrogated the States' immunity and *at the same time* expressly excluded the States from Title VII's coverage, an absurd conclusion.

Reply Br. at 1-2. This response, we believe, lacks both logic and persuasiveness. The substantive provisions of Title VII did not change between 1964 and 1972; the 1972 amendment merely extended Title VII to the States. It is perfectly appropriate, therefore, in applying principles of congruence and proportionality, to compare the substantive provisions of Title VII, as extended to the States in 1972, to the limitations placed on the States by the Equal Protection Clause.

In the present case, the legislative record confirms that Congress was responding to a pattern of discrimination by the States. The legislative history shows that Congress relied upon and adopted two comprehensive studies of racial and national origin discrimination to support its proposed legislation. *See* H.R. Rep. No. 92-238, at 17 (1971). The first of these "indicate[d] that widespread discrimination against minorities exist[ed] in State and local government employment. . . ." *Id.* The legislative record also specifically addresses the problem of racial and gender discrimination in academia. *See id.* at 19-20. Finally, statistical evidence bolstered Congress' view that "there exist[ed] a profound economic discrimination against women workers" across all fields, and, consequently, legislation was needed to strengthen and broaden federal administrative procedures for combatting this discrimination. *Id.* at 4.

Not only did Congress document the need for additional legislation protecting minority and women workers employed by the states, local governments, and specifically educational institutions, Congress had become familiar with the problems of race and national origin discrimination in the public and private sector in enacting the Civil Rights Act of 1964, and with the problems of gender discrimination in considering the Equal Rights Amendment and the Educational Opportunity Act, *see Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 625 (8th Cir. 2001). Such familiarity " 'reduce[s] the need for fresh hearings and prolonged debates.' " *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring)). As we concluded in *Varner*, "[w]e believe that this evidence is sufficient to support the limited action taken by Congress in its passage of [the 1972 Act], particularly

given the well-documented history of gender [and race] discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence." *Varner*, 226 F.3d at 935-36.

We are not alone in concluding that Congress validly abrogated the States' Eleventh Amendment immunity in passing the 1972 Act. In *Okruhlik*, the Eighth Circuit also rejected an Eleventh Amendment challenge to Title VII. Following the guidelines of the Supreme Court, that circuit looked at the legislative history where it found "much support" for Congress' action. *Okruhlik*, 255 F.3d at 624. As well, it compared the scope of the employer's responsibility under Title VII to its responsibility under the Equal Protection Clause and noted that "the elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution." *Id.* at 626. Any differences between the two protections, either by way of remedies or scope,[8] were "proportional and congruent" responses to a pattern of unconstitutional state action. *Id.*

Because the disparate treatment provision of Title VII prohibits little if any constitutional behavior and because Congress was acting on a solid evidentiary ground in extending Title VII to the States, we hold that the 1972 Act validly abrogated the States' Eleventh Amendment immunity with respect to Title VII disparate treatment claims.

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8. The Eighth Circuit considered the effect of Title VII's disparate impact provisions as well as Title VII's disparate treatment provision. *See Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 626 (8th Cir. 2001).

B. Prayer for Injunctive Relief in Count II

The University also challenges the district court's failure to dismiss Dr. Nanda's claimsfor injunctive relief pursuant to 42 U.S.C. § 1983. The University and its officials contend that the district court erred when it let stand Dr. Nanda's request in Count II for injunctive relief against the University officials in their official capacities. Because the requested relief of reinstatement can be granted only by the University acting through its trustees, the defendants contend that this request is appropriately characterized as a request for injunctive relief against the University. The University, they continue, is protected by the Eleventh Amendment from such relief. Before we address the merits of this claim, we must first consider whether we have jurisdiction to entertain this aspect of the appeal.[9]

We believe that we have jurisdiction over this contention for the same reason that we have jurisdiction over the earlier contention concerning the applicability of the Eleventh Amendment to a suit under Title VII. In essence, the defendants are claiming that the Eleventh Amendment provides them with a shield from litigating this claim. This situation therefore is different from the situation in *Cherry* in which we held that a claim of immunity from punitive damages

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9. Dr. Nanda did not argue that this court lacked jurisdiction to entertain the University's appeal on this issue; however, this court must assure itself of its own jurisdiction regardless of whether the issue was raised by a party. *See Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 660 (7th Cir. 1999) ("A court of appeals has an obligation to examine its jurisdiction sua sponte, even if the parties fail to raise a jurisdictional issue.").

under Title IX was not the equivalent of a claim of immunity from litigation. *See Cherry*, 265 F.3d at 547. As our citations to *Burns-Vidlak v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999), and to *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994), confirm, in *Cherry* we were speaking of a claim of immunity not based on the Eleventh Amendment.

We agree with the district court that, under § 1983, a suit against state officials in their official capacity limited to injunctive relief is not barred by the Eleventh Amendment. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Whether such relief is warranted and whether it is warranted against these defendants are matters not properly before us on this interlocutory appeal.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AUGUST 21, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 00 C 4757

Judge Rebecca R. Pallmeyer

NAVREET NANDA, PH.D.,

Plaintiff,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Navreet Nanda has brought this action against the Board of Trustees of the University of Illinois and University officials. Nanda alleges that Defendants violated her constitutional rights and discriminated against her on the basis of her sex, her race, and her national origin by discharging her from her position as a professor at the

University's College of Medicine. In Count I of her complaint, Plaintiff invokes Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(2)(a)(1) and (2). In Count II, she alleges claims against the individual Defendants under 42 U.S.C. § 1983 for deprivation of her equal protection rights. Count III is a common law tort claim in which Plaintiff alleges that Defendant Bellur Prabhakar, the chairman of her department, intentionally interfered with her contractual relationship with the University.

Defendants have moved to dismiss all three counts. For the reasons discussed below, the motion is granted in part and denied in part.

Count I: Title VII

Defendants argue, first, that the court should dismiss Count I pursuant to Fed. R. Civ. P. 12(b)(1) because Plaintiff's Title VII claims against the state officials are barred by the Eleventh Amendment. By extending Title VII coverage to the states with respect to sex, race, and national origin discrimination, Defendants argue, Congress exceeded its authority under Section 5 of the Fourteenth Amendment. Defendants' argument relies heavily on recent decisions of the United States Supreme Court sustaining constitutional challenges to the exercise of congressional power. (Defendants' Memorandum in Support of Motion to Dismiss ("Defendants' Memo"), at 5,6.) *See United States v. Lopez*, 514 U.S. 549 (1995) (striking down a federal law criminalizing the possession of guns near schools); *Printz v. United States*, 521 U.S. 898 (1997) (striking down a law requiring local police to conduct background checks on gun purchasers); *Seminole Tribe of*

Florida v. Florida, 517 U.S. 44 (1996) (striking down a law that permitted Indian tribes to sue states on claims relating to casinos); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down provisions of the Violence against Women Act which authorized suit by rape victims against their attackers).

In particular, Defendants emphasize cases in which the Court has invalidated laws that permit suits against states for age discrimination and discrimination based on disability. In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), the Court concluded that Congress exceeded its authority under section 5 of the Fourteenth Amendment to enact "appropriate legislation" when it enacted legislation that permitted a state worker to sue the state for age discrimination. More recently, in *Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court reached the same conclusion with respect to the Americans with Disabilities Act, holding that Congress lacked evidence of any pattern of irrational state discrimination in employment against the disabled adequate to support exercise of its section 5 power. In Defendants' view, if the Supreme Court were to address the issue, it would reach the same conclusion with respect to race, sex, and national origin discrimination: that the legislative record before Congress in 1972, when it amended Title VII to broaden its coverage to the states, was insufficient to establish any broad pattern of such discrimination on the part of state employers. (Defendants' Memo, at 9.)

This court does not write on a clean slate concerning this issue. In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976), the Supreme Court concluded that in the 1972 Amendment

to Title VII of the Civil Rights Act of 1964, "Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages . . . against a state government. . . ." Defendants here nevertheless argue that *Fitzpatrick* did not decide whether the substantive provisions of Title VII were in fact a proper exercise of Congressional authority. (Defendants' Reply Memorandum, at 9.) Since *Fitzpatrick*, however, the Courts of Appeals have held consistently that the 1972 and 1991 amendments to the Civil Rights Act *do* abrogate the States' immunity and permit claims for damages against the States. *See Holman v. State of Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 2000) (sex harassment claims against state employer are permitted) (citing *Fitzpatrick*, 427 U.S. at 448-49; *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998) ("The Eleventh Amendment is no bar to Velasquez's claim of national-origin discrimination [against Indiana University], a claim founded on a statute (Title VII) that is clearly within the scope of section 5 of the Fourteenth Amendment.") *vacated in part on other grounds*, 165 F.3d 593, 594 (7th Cir. 1999); *Winbush v. Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995) (award of prejudgment interest against state employer authorized by 1991 Amendments to Title VII); *Greenwood v. Ross*, 778 F.2d 448, 452-53 (8th Cir. 1985) (1972 Act) ("the district court erred in dismissing the Title VII [retaliation] claim against the [state university] Board of Trustees as barred by the eleventh amendment."); *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000) (race and national origin discrimination case against state university not barred by Eleventh Amendment); *In re Employment Discrimination Litig. Against the State of Alabama*, 198 F.3d 1305, 1316-17 (11th Cir. 1999); *Ussery v. Louisiana*, 150 F.3d 431, 434-35 (5th Cir. 1998);

Cerrato v. San Francisco Cmty. College Dist., 26 F.3d 968, 975-76 (9th Cir. 1994) (Eleventh Amendment does not bar race discrimination claims against a college which is a state instrumentality).

Defendants are unmoved by the weight of this authority. They argue that the Title VII amendments do not meet the two-part test set forth in *Kimel* and *Garrett* and other recent decisions, which requires a showing of (i) congruence and proportionality; and (ii) legislative findings of a history of discrimination, in order to support the conclusion that Eleventh Amendment immunity is abrogated. Defendants appear to believe that, if the issue came before the Supreme Court again, the Court would find no support in the legislative record for such a broad exercise of power. The Supreme Court itself has cautioned against such reading in the tea leaves. In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court reminded lower courts that the business of revisiting precedent is for the Court that established that precedent:

> [If] a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.

Id. at 237 (quoting *Rodriguez de Quijas v. Shearson/ Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This court is unwilling to reconsider whether the Congressional record is adequate to support the Supreme Court's conclusion in *Fitzpatrick*. Significantly, in order to do so, the court would

be required to ignore language from our own Court of Appeals: In a decision rendered after *Kimel*, the Seventh Circuit adhered to its precedents and concluded, albeit in *dicta*, that the Eleventh Amendment does not bar a pay discrimination claim brought by female faculty against Illinois State University. *Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000). For the same reasons that the Courts of Appeals must follow controlling decisions from the Supreme Court, this court is bound to adhere to the precedents established by the Seventh Circuit. *See Pickett v. Prince*, 52 F. Supp. 2d 893, 904 (N.D. Ill. 1999) ("a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum.") (quoting *Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984)).

In any event, although our Court of Appeals has not addressed the issue since the Supreme Court decided *Garrett*, this court does not share Defendants' confidence that *Garrett* will turn the tide in their favor on this issue. One other Court of Appeals has carefully considered the matter, post-*Garrett*, in a case very similar to this one, involving female professors who brought race and sex discrimination claims against a state university. In *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), the Eighth Circuit overruled the University's Eleventh Amendment objection to its jurisdiction, citing *Fitzpatrick* as controlling authority. The court also cited *Agostini* as the basis for its refusal to reconsider the issue, but observed, "If we were free to reconsider *Fitzpatrick* and our prior case law, our study would lead us to conclude that Congress unmistakably expressed its intent in the 1972 Act to subject states to suits under

Title VII." 255 F.3d at 622. The Eighth Circuit proceeded to review the history of the 1972 amendments to Title VII in detail and concluded that both prongs of the test for valid abrogation of Eleventh Amendment immunity are met. *See also Maitland v. Univ. of Minn.*, No. 00-2192, 2001 WL 914196 (8th Cir. Aug. 15, 2001).

This court, persuaded by *Okruhlik* and the authorities cited therein, concludes that it may, consistent with the Constitution, exercise jurisdiction over Professor Nanda's Title VII claims. Defendants' motion to dismiss Count I is denied.

Count II: Section 1983 Equal Protection Claim

In Count II, Plaintiff alleges that Defendant Bellur Prabhakar treated her differently and "took adverse actions against her public employment at UIC" in violation of her Constitutional right to the equal protection of the laws. (Complaint ¶ 23.) She alleges that Defendants Moss, Hoffman, Broski, and Stukel "facilitated, approved, or turned a blind eye to Prabhakar's actions." (*Id.* ¶ 24.) Plaintiff seeks injunctive relief as well as compensatory and punitive damages against the individual Defendants pursuant to 42 U.S.C. § 1983. (*Id.* ¶¶ 32-34, 36.)

Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Defendants seek dismissal of Count II on grounds that, while Prabhakar, Moss, Hoffman, Broski and Stukel are persons, they are state officials named in their official capacities. The Supreme Court has held that a lawsuit under § 1983 against state officials constitutes a suit against the State itself, and that neither a State nor its officials acting in their official capacities are "persons" under § 1983 for purposes of damage awards. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985)). The Court acknowledged in *Will* that a claim for injunctive relief may properly be brought against state officials, however. 469 U.S. at 471 n.10 (citing *Kentucky v. Graham*, 473 U.S. at 167 n.14).

Defendants are correct that, under this authority, Plaintiff's claim for damages against the individual Defendants must be dismissed. Where, as in this case, the complaint does not specify whether Defendants are being sued in their individual or their official capacities, the court ordinarily will construe the complaint as raising only official capacity claims. *See Stevens v. Umsted*, 131 F.3d 697, 706 (7th Cir. 1997). The court recognizes its discretion to interpret a claim as against an official in his or her individual capacity if the actions of the parties, since the filing of the complaint,

demonstrate that they assume this to be the case. *See Stevens*, 131 F.3d at 706. The parties' conduct in this case suggests they did not make this assumption, however. The individual Defendants are all represented by the same attorneys who represent the University Board of Trustees. If the Defendants believed they faced individual liability for compensatory damages, the court expects that they might well have sought independent representation. Plaintiff's request for an award of punitive damages only reinforces this court's concern that defense strategy and interest might well differ from one of the individual Defendants to another.

In her memorandum in opposition to the motion to dismiss, Plaintiff requests that, if the court determines that she has not stated individual capacity damages claims, she be granted leave to file an amended complaint to assert such claims. (Plaintiff's Response Memorandum, at 10-11.) Although a motion for leave to amend is not formally before the court, the court notes that the concerns outlined above render the court reluctant to entertain such an amendment at this stage. It is Plaintiff who has pressed for an early trial date and objected to Defendants' frequent entreaties for continuance. If the complaint were to be amended to assert damages claims against the individual Defendants, the court would be required to consider whether the change in their potential liability requires the court to permit additional time for preparation of defense and potential consultation with independent counsel.

Defendants' motion to dismiss individual damages claims in Count II is granted. Plaintiff's claim for injunctive relief in this count will stand.

Appendix B

Count III: Interference with Employment Relationship

In Count III of her complaint, Plaintiff alleges a pendent state law tort claim against Defendant Bellur Prabhakar for "intentional interference . . . with her employment relationship" with the University. Defendants argue this count fails to state a claim for relief because (1) Plaintiff did not in fact have a contractual employment relationship with the University; (2) there are no allegations that Dr. Prabhakar directed any action toward a third party; and (3) Prabhakar's alleged wrongful acts did not cause her discharge. (Defendants' Memorandum, at 16-18, 19, 20.) They argue, further, that this interference claim is "inextricably linked" to her claims of discrimination and is therefore preempted by the Illinois Human Rights Act. *See Maksimovic v. Tsogalis*, 177 Ill.2d 511, 517, 687 N.E.2d 21, 23 (1997); *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 639 N.E.2d 1273 (1994).

In her response to the motion, Plaintiff explains that "Count III is based solely on the existence of the contract . . . which consisted of a promise to specific space for as long a time as Plaintiff was employed by UIC." (Plaintiff's Response Memorandum, at 15.) She cites a May 7, 1996 letter from Dr. Philip Matsumura, Dr. Prabhakar's predecessor as department head, in which Dr. Matsumura refers to "the terms of the [employment] offer," and specifically lists "Lab/Office Space," identifying "Room E-709" and "room E-709A" as the office and lab space he expected she would occupy. (Matsumura letter of 5/7/96, Ex. A to the Complaint.) The court has difficulty understanding Dr. Matsumura's reference to office and lab space as an independent contract between Plaintiff and the University. Plaintiff could only

be expected to occupy office and lab space if she were employed as a University professor. Nor will the court accept the suggestion that assignment to Room E-709 was a condition of her employment relationship; surely Plaintiff would not argue that a decision on the part of the University to move the department from one building or floor to another at any point would constitute a breach of her employment contract.

The court need not reach the question of whether Plaintiff has adequately alleged the existence of a contractual relationship, however. Plaintiff's allegations make it clear that she believes Dr. Prabhakar was motivated by sex, race, and national origin discrimination in his behavior toward her, including his conduct with respect to her assigned office space. She alleges that "on account of Plaintiff's sex, race and national origin, Prabhakar . . . [d]elay[ed] and resist[ed] providing Nanda with a suitable lab in which to conduct her research, after Prabhakar took for himself the lab which had been promised to Nanda." (Complaint, Count II ¶ 23(b).) Because the tortious interference charge cannot stand alone without the improper motivation of conduct prohibited by the Human Rights Act, the claim is inextricably linked to the Human Rights Act, which provides an exclusive remedy. *See Welch v. Illinois Supreme Court*, 322 Ill. App. 3d 345, __ N.E.2d __, 2001 WL 618588, at *7 (3d Dist. June 4, 2001).

The court concludes that Plaintiff's tort claim is preempted by the Illinois Human Rights Act. Defendants' motion to dismiss Count III is therefore granted.

Appendix B

CONCLUSION

Defendants' motion to dismiss the Title VII claims (Count I) for lack of jurisdiction is denied. Their motion to dismiss claims under Count II is granted with respect to damages claims, but denied with respect to the request for injunctive relief. Defendant Prabhakar's motion to dismiss Count III (Doc. No. 54-1) is granted.

ENTER:

Dated: August 21, 2001

s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Court

APPENDIX C — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 USCS § 2000e-2 (2002)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

Appendix C

USCS Const. Amend. 11 (2002)

Suits against states—Restriction of judicial power.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

USCS Const. Amend. 14, § 1 (2002)

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

USCS Const. Amend. 14, § 5 (2002)

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

775 ILCS 5/2-102 (2002)

ILLINOIS HUMAN RIGHTS ACT

§ 775 ILCS 5/2-102. Civil Rights Violations — Employment

Sec. 2-102. Civil Rights Violations—Employment. It is a civil rights violation:

(A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.

* * * *

Appendix C

775 ILCS 5/1-103 (2002)

ILLINOIS HUMAN RIGHTS ACT

§ 775 ILCS 5/1-103. General Definitions

Sec. 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

* * *

(Q) *Unlawful Discrimination.* "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, or unfavorable discharge from military service as those terms are defined in this Section.

* * * *

Supreme Court U.S.
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JAN 15 2003
OFFICE OF THE CLERK

No. 02-925

IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, Ph.D., GERALD MOSS, M.D., ELIZABETH HOFFMAN, Ph.D., DAVID C. BROSKI and JAMES J. STUKEL, Ph.D.,

Petitioners,

v.

NAVREET NANDA, Ph.D. and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NAVREET NANDA, Ph.D.

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STATEMENT OF THE CASE

Respondent, Navreet Nanda, Ph.D., a former assistant professor of immunology in the department of microbiology and immunology at the University of Illinois at Chicago College of Medicine, brought this action against Petitioners, the Board of Trustees of the University of Illinois, her former department head, Bellur Prabhakar, Ph.D., the Dean of the College of Medicine, Gerald Moss, M.D., the former Provost and Vice Chancellor for Academic Affairs, Elizabeth Hoffman, Ph.D., the Chancellor, David Broski, and the President of the University of Illinois, Gerald Stukel, Ph.D., (collectively, "University"), for unlawfully terminating her employment because of her race, (Asian), national origin, (Indian), and her gender. Count I of Nanda's complaint alleged that she had been subjected to harassment and that she was fired on the basis of her race, national origin and sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII"). Count II of the complaint brought a claim under 42 U.S.C. §§ 1983 and 1988 for violation of her right to equal protection and sought injunctive relief, compensatory and punitive damages and attorneys fees. Nanda also brought a claim under Illinois law in Count III of her complaint against Prabhakar for intentional interference with her employment contract with University.

University moved to dismiss Nanda's Title VII action in Count I of the complaint, contending that Congress did not validly abrogate the States' sovereign immunity under the Eleventh Amendment when it extended Title VII to the States in 1972. University also moved to dismiss the § 1983 claim in Count II, and the state law claim in Count III. The District Court denied the University's motion to dismiss Count I, granted the motion to dismiss the § 1983 claims for damages, but denied the motion to dismiss the claims for injunctive relief, and

dismissed the state law action in Count III. The Court of Appeals for the Seventh Circuit affirmed the denial of University's motion to dismiss the Title VII claims, holding that Congress validly exercised its power under § 5 of the Fourteenth Amendment to extend Title VII to the States. The Seventh Circuit also affirmed the District Court's rulings on the § 1983 claims. University's petition for *certiorari* concerns only the Title VII action in Count I.

University contended below *only* that Congress failed to create a sufficient record to support the extension of Title VII to the States. Whether Congress was required to document a pattern of unconstitutional discrimination in state employment before § 5 of the Fourteenth Amendment permitted Congress to make Title VII applicable to the States and if so, whether a sufficient legislative record exists are the only issues that should properly be before this Court. The District Court and the Seventh Circuit correctly rejected the University's claim that a legislative record of a pattern of unlawful employment discrimination was the "*sine qua non*" to upholding the 1972 amendments to Title VII.

As the District Court noted, University's sole argument was that under *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 140 L. Ed. 2d 522 (2000) and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in order to extend Title VII to the States, Congress had to find a pattern of discrimination in state employment. The District Court began its analysis by noting that *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 2671, 49 L. Ed. 2d 614 (1976) held that § 5 of the Fourteenth Amendment authorized Congress to make Title VII binding upon the States. In response to University's claim that *Fitzpatrick* did not decide whether the substantive provisions of Title VII were a proper exercise of Congressional authority, the District Court observed that numerous Courts of Appeal have consistently held since

Fitzpatrick that Congress was well within its power to subject the States to Title VII.

The District Court also reasoned it was bound by the Seventh Circuit's opinion in *Varner v. Illinois State University*, 226 F.3d 921 (7th Cir. 2000), *cert. denied*, 533 U.S. 902, 121 S. Ct. 2241 (2001), which upheld the Equal Pay Act ("EPA") against an Eleventh Amendment challenge based on virtually the same argument that University made here against Title VII. In *Varner*, the court noted that *Kimel*, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199, 2210, 144 L. Ed. 2d 575 (1999), and *City of Boerne v. Flores*, 521 U.S. 507, 531-32, 117 S. Ct. 2157, 138 L. Ed. 2d 2157 (1997) held that a "lack of support [in the legislative record] is not determinative of the § 5 inquiry". 226 F.3d at 935. Relying on *City of Boerne*, 521 U.S. at 533, the *Varner* court noted that this

> observation is particularly relevant in the context of the Equal Pay Act, where the value of congressional findings is greatly diminished by the fact that the Act prohibits very little constitutional conduct. ... and where the historical record clearly demonstrates that gender discrimination is a problem that is national in scope.

226 F.3d at 935.

The District Court then followed the Eighth Circuit's opinion in *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), which rejected an Eleventh Amendment challenge to Title VII for two reasons. First, the *Okruhlik* court believed that it was bound by *Fitzpatrick*. Secondly, the *Okruhlik* court was not persuaded by the same claim University made in the present case, that *Kimel* and *Garrett* required a different conclusion because Congress supposedly failed to demonstrate

an adequate record of widespread discrimination in state employment. The *Okruhlik* court referred to a report released in 1969 by the U.S. Commission on Civil Rights cited in the Congressional Record, H.R. Rep. No. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152, which concluded that "employment discrimination in State and local governments is *more prevasive* than in the private sector". (emphasis added).

On appeal, the Seventh Circuit rejected the University's claim that *Garrett* established a more stringent test to abrogate Eleventh Amendment immunity by satisfying not only the "congruence and proportionality" test of *City of Boerne*, but also showing clear evidence of constitutional violations in the Congressional record. The *Nanda* court noted that it had previously held, based on *Fitzpatrick*, that there was no Eleventh Amendment immunity to Title VII. However, in light of the statement in *Fitzpatrick* that the substantive provisions of Title VII were not being challenged, and in light of this Court's recent Eleventh Amendment cases, the Seventh Circuit reasoned it was "prudent" to assume that *Fitzpatrick* alone did not control the issue. 303 F.3d 817, 822.

Following *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, the Seventh Circuit held that the first step in applying these principles to Title VII was to "identify with some precision the scope of the constitutional right at issue". 303 F.3d at 828. Gender based classifications are subject to a heightened scrutiny such that those who seek to defend a gender based government action must demonstrate an "exceedingly persuasive justification" for that action, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). Racial classifications are subject to strict scrutiny and can be justified only if they promote a compelling state interest and are narrowly tailored to serve that interest. The burden of proof under Title VII and under the equal protection clause for racial or gender-based discrimination is

identical: a plaintiff must show intentional discrimination. Discriminatory intent can be proven directly, or indirectly, by showing that an employee was a member of a protected class, was meeting her employer's legitimate expectations, and that other, similarly situated workers were treated more favorably. Since the aim of Title VII and the method of proving a violation of that statute are the same as the goal of the equal protection clause and manner of showing a denial of equal protection, Congress did not impermissibly redefine States' obligations under the Fourteenth Amendment when it extended Title VII to the States in the 1972 amendments. 303 F.3d at 829-30.

In light of the fact that Title VII prohibited "little if any constitutional conduct", the court held that the value of Congressional findings is greatly diminished. The court also reaffirmed its conclusion in *Cherry v. University of Wisconsin Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001), which rejected another Eleventh Amendment challenge to the EPA based on *Garrett*, that *Garrett* had not "established a new, bright-line rule" that Congress' attempt to abrogate Eleventh Amendment immunity is void without specific findings that States had engaged in a pattern of unconstitutional conduct. The court explained that *Garrett* held only that the legislative record was important "where the statute in question pervasively prohibits *constitutional* State action". 303 F.3d at 828. (emphasis added).

To the extent that a Congressional record was a factor to consider, the Seventh Circuit held that the legislative record contained ample evidence that Congress was responding to a pattern of discrimination by the States, citing two comprehensive studies of racial and national origin discrimination, one of which specifically addressed the problem of discrimination in academia. The court also noted that Congress became familiar with the problems of race and national origin discrimination in enacting the Civil Rights Act of 1964, in considering the Equal

Rights Amendment, and in enacting the Educational Opportunity Act. Relying on *Fullilove v. Kluznick*, 448 U.S. 448, 503 (1980), the Seventh Circuit reasoned that such familiarity with the problem of racial, national origin and gender discrimination "reduc[ed] the need for fresh hearings and prolonged debates". The court then held that, particularly in light of "the well documented history of gender and race discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence", the Congressional record supported the 1972 amendments to Title VII. 303 F.3d at 831. Finally, the court noted that the Eight Circuit in *Okruhlik* followed a similar analysis in upholding Title VII against an Eleventh Amendment challenge.

REASONS FOR DENYING THE PETITION

University contends that this Court should now answer the question it supposedly reserved for future judgment in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11, 96 S. Ct. 2666, 2671, 49 L. Ed. 2d 614 (1976): whether Congress properly abrogated the States' Eleventh Amendment immunity to suit under Title VII. Petitioners ignore the fact that *Fitzpatrick* squarely held that § 5 of the Fourteenth Amendment gave Congress the power to abrogate the States' Eleventh Amendment immunity to the extent that Congress could render States subject to the back pay and attorney fee awards authorized by Title VII. This Court recognized that the back pay and attorney fee provisions of Title VII were "appropriate legislation [under § 5] for the purpose of enforcing the provisions of the 14th Amendment". 427 U.S. at 456, 96 S. Ct. at 2671. This holding has been repeatedly reaffirmed in almost every Eleventh Amendment case that this Court has decided since *Fitzpatrick*. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59, 116 S. Ct. 1114, 1125, 134 L. Ed. 2d 252 (1996); *Florida Prepaid*

Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 636-37, 119 S. Ct. 2199, 2210, 144 L. Ed. 2d 575 (1999); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80, 120 S. Ct. 63, 140 L. Ed. 2d 522 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

University attempts to gain milage from this Court's statement in a footnote in *Fitzpatrick* that the state officials in that case did not argue that the substantive provisions of Title VII were not a proper exercise of Congressional power under § 5 of the Fourteenth Amendment. However, nothing in *Fitzpatrick* purported to suggest that even though § 5 of the Fourteenth Amendment authorized Congress to subject States to liability for back pay and attorney fee awards under Title VII, Congress was powerless to extend the substantive provisions of Title VII to the States. How can States be subject to back pay and attorney fee awards authorized by Title VII unless States are bound by Title VII's substantive requirements?

University is asking this Court to either accept the anomalous, inconsistent and constitutionally repugnant result, that States are liable for back pay and attorneys' fees under Title VII, but are not bound by that statute's substantive provisions, or overrule *Fitzpatrick*. What University seeks is truly frightening. It is dangerous. It would undo everything this country did to remedy its shameful, three-hundred year history of discrimination based on race, national origin, and gender, progress that was made only after painful decades of demonstrations and riots in the streets. As this Court recognized in *Fitzpatrick*, there can be no legislation that is more "appropriate" to enforce the Fourteenth Amendment's guarantee of equal protection of the law than the prevention of discrimination in employment on the basis of race, color, national origin, religion and gender. If this Court grants *certiorari* and holds that Congress exceeded its power under § 5 of the

Fourteenth Amendment by extending Title VII to the States, this Court will tear the very heart out of the Fourteenth Amendment. The guarantee of equal protection will become illusory and meaningless. This Court must not allow this to happen.

University also claims the Seventh Circuit's decision "facilitates continued assaults against the dignity of States as sovereign entities" and ignores "the sacred compact by which all citizens agreed to be governed, and at the same time undermined the very constitutional framework that permits social problems such as discrimination to be peacefully resolved". (Petition, p. 18) Understandably absent from University's petition is any explanation of how recognizing an Eleventh Amendment immunity to Title VII to enable States to discriminate against their employees on the basis of race, color, national origin, religion or gender in hiring and firing, furthers the peaceful resolution of social problems such as discrimination. It should be obvious that conferring immunity upon States to engage in such conduct does not resolve discrimination; it encourages and perpetuates discrimination. University is also asking this Court to ignore the "continued assaults against the dignity" of State employees that an Eleventh Amendment immunity to Title VII would allow States to perpetrate.

The "constitutional framework" that would be undermined by granting the University's petition is the very fabric of the Fourteenth Amendment itself, because States would then be free to deny equal protection and due process to their employees. While States may be co-equal sovereigns with the Federal government in some respects, State sovereignty does not mean, and has never meant, that States can deny their employees the rights guaranteed them under the Constitution of the United

States. As this Court explained in *Alden v. Maine*, 527 U.S. 706, 754-55, 119 S. Ct. 2240, 2266, 144 L. Ed. 2d 636 (1999):

> "The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statues that comport with the constitutional design."

Fitzpatrick, 427 U.S. at 456 ("Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . [T]he substantive provisions of the Fourteenth Amendment . . . embody significant limitations on state authority"). This Court should not now hold that the "dignity" of a State's sovereign status requires that State employees surrender their constitutional rights upon accepting State employment.

University further argues that Title VII litigation "will continue to both undercut the careful balance between federal and state power established by the constitution and unnecessarily drain these States' treasuries . . . [and] places an unconstitutional burden on these States' hiring and firing practices". (Petition, p. 11). University fails to appreciate that the balance of Federal and State power was altered *with the full consent of the States* when they ratified the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 454, citing *Ex parte State of Virginia*, 100 U.S. 339, 345-48, 25 L. Ed. 2d 676 (1880) ("[E]nforcement [of the prohibitions of the Fourteenth Amendment] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact"). It is more

than a little offensive for University to consider a prohibition against discrimination in employment on the basis of race, national origin or gender as a "burden". The guarantee of equal protection is instead one of the blessings of our system of government. If there is a "burden" on State treasuries or "burden" on State employment practices by the Fourteenth Amendment's guarantee of equal protection, it is the "price" the States agreed to pay when they adopted the Fourteenth Amendment.

University also asserts that *certiorari* should be granted because the Seventh Circuit's decision was contrary to the decisions of five other circuit courts, as well as in violation of this Court's Eleventh Amendment jurisprudence. In point of fact, however, no court has ever held that Congress exceeded its authority in extending Title VII to the States. Every case University cites concerns whether Congress properly abrogated States' immunity to the Family Medical Leave Act, ("FMLA"), not Title VII. Decisions relating to the FMLA are irrelevant to Title VII because unlike Title VII, the FMLA does not on its face prohibit discrimination on the basis of race, national origin or gender.

Nanda also comports with this Court's Eleventh Amendment decisions. This Court recently *twice declined to grant certiorari* to determine whether there is an Eleventh Amendment immunity to Title VII. First, in *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052, 121 S. Ct. 657 (2000), which relied on *Fitzpatrick* to sustain Title VII, and, more recently in *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001), *cert. denied*, __U.S. __, 122 S. Ct. 1300, 152 L. Ed. 2d 212 (2002), which upheld Title VII against the same arguments based on *Kimel* and *Garrett* that University makes here. *Maitland* reaffirmed the Eighth Circuit's decision in *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), which the Seventh Circuit cited with approval in *Nanda*.

This Court also declined to grant *certiorari* in *Varner v. Illinois State University*, 226 F.3d 921 (7th Cir. 2000), *cert. denied*, 533 U.S. 902, 121 S. Ct. 2241 (2001), which rejected the identical contention with respect to the EPA. This Court's denial of *certiorari* in *Varner* is particularly important because this Court earlier vacated the Seventh Circuit's initial opinion upholding the EPA and remanded with directions to reconsider that decision in light of its opinion in *Kimel*. 120 S. Ct. 928, 145 L. Ed. 2d 806 (2000). This Court's decisions to refuse *certiorari* after the Seventh Circuit held that *Kimel* did not require that it change its holding in *Varner* and to decline to hear *Maitland* and *Johnson*, strongly suggests that this Court agrees with way the Courts of Appeal have applied *Kimel* and *Garrett* to Title VII. There is nothing new in the Seventh Circuit's opinion in *Nanda* that requires this Court's intervention. For all of these reasons, University's petition should be denied.

I. There Is No Conflict Among The Courts Of Appeal Over Whether Congress Properly Abrogated The States' Eleventh Amendment Immunity In Enacting The 1972 Amendments To Title VII.

University argues that this Court should hear this case to resolve a "conflict" among the Courts of Appeal between the decision in *Nanda*, and decisions of the First, Third, Fourth, Fifth and Eleventh Circuits, that have held that Congress exceeded its power under § 5 of the Fourteenth Amendment in extending the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, *et seq.*, to the States. This contention is without merit for three reasons. First, none of the cases discussing the FMLA even mentioned Title VII. The University ignores the fact that every court that has considered whether Congress properly abrogated the States' sovereign immunity in enacting the 1972 amendments to Title VII has rejected any claim that States were not subject to Title VII. Second, the only conflict among the

Courts of Appeal that exists does not relate to Title VII, but concerns the FMLA. *Hibbs v. Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001), which University does not cite, and *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), reached opposite results on whether § 2612(a)(1)(C) of the FMLA, which provides for leave to care for sick family members, can be applied to the States. This Court has already granted *certiorari* in *Hibbs* to resolve this dispute and is scheduled to hear argument this month. Third, even if the FMLA cases were relevant, these decisions fit comfortably with the Seventh Circuit's analysis of Title VII in *Nanda* and with this Court's Eleventh Amendment cases.

There is an unbroken line of decisions holding the 1972 amendments to Title VII were a proper exercise of Congress' power under § 5 of the Fourteenth Amendment. *Jones v. Washington Metropolitan Area Transit Auth.*, 205 F.3d 428, 434 (D.C. Cir. 2000) (relying on *Fitzpatrick*); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Ussery v. Lousiana*, 150 F.3d 431, 434-35 (5th Cir. 1998), *cert. denied pursuant to Rule 46.1*, 526 U.S. 1013, 119 S. Ct. 1161 (1999) (relying on *Fitzpatrick*); *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052, 121 S. Ct. 657 (2000) (citing *Fitzpatrick*); *Holman v. State of Indiana*, 211 F.3d 399 (7th Cir. 2000) (citing *Fitzpatrick*); *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593, 594 (7th Cir. 1999); *Merheb v. Illinois Toll Highway Auth.*, 267 F.3d 710 (7th Cir. 2001) (citing *Fitzpatrick*); *Winbush v. Iowa*, 66 F.3d 1471 (8th Cir. 1995); *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985); *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001) (rejecting contention that under *Kimel* and *Garrett* there was an inadequate legislative record to support Title VII); *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001), *cert. denied*, __ U.S. __, 122

S. Ct. 1300, 152 L. Ed. 2d 212 (2002) (same); *Warren v. Prejean*, 301 F.3d 893 (8th Cir. 2002) (same); *Cerrato v. San Francisco Cmty. College Dist.*, 26 F.3d 968 (9th Cir. 1994) (citing *Fitzpatrick*); *In re Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1322-23 (11th Cir. 1999) (disparate impact provision of Title VII was "congruent and proportional" to Fourteenth Amendment under *City of Boerne*). *Nanda* is merely the latest in a long line of cases to reach the same result. University does not contend that any of these cases were wrongly decided. Indeed, University does not discuss them at all. No "conflict" exists that this Court needs to resolve.

The other cases University cites, *Chittister v. Dept. of Comm. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 812, 151 L. Ed. 2d 812 (2002) and *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001), are irrelevant to any analysis of Title VII because they all concerned § 2612(a)(1)(D) of the FMLA, which provides for leave for ones' own illness. There is nothing about requiring leave for one's own sickness that directly or indirectly implicates the equal protection concerns of discrimination based on race, national origin or gender that are the heart and soul of Title VII. *Hibbs* upheld a different subsection of the FMLA, § 2612(a)(1)(C), than was involved in the cases University cites. Subsection (C) requires leave to care for sick family members. The *Hibbs* court upheld subsection (C) because it concluded that leave to care for sick family members was intended to alleviate gender discrimination. Significantly, *Hibbs* distinguished the cases the University cites by noting that the section of the FMLA at issue in the those cases, requiring leave for one's own illness, cannot be plausibly justified as an attempt to remedy gender discrimination. 273 F.3d at 850-51. Accordingly, the cases University cites are irrelevant to any analysis of Title VII.

Moreover, there is nothing in the decisions upon which University relies that conflicts with *Nanda*. In particular, none of these cases hold that there must be "actual constitutional violations by the States" (Petition, p. 10) in the Congressional record before Eleventh Amendment immunity can be validly abrogated.

Kazmier recognized that "Congress' exercise of its § 5 power is always authorized when enacting strictly remedial legislation that narrowly targets clearly *un*constitutional State conduct." 225 F.3d at 524 (emphasis in original). *Kazmier* also agreed with *Nanda* that it is only where the statue in question attempts to restrain a State from engaging in *constitutionally permissible* conduct that Congress must justify the need to do so in the legislative record. However, the court held that if the statute was "solely remedial in nature, the absence of constitutional violations [in the Congressional record] might not present a problem." 225 F.3d at 524-25.

For the court, subsection (C) of the FMLA was not remedial, but was "broad prophylactic legislation" because there was no constitutional right to leave to attend to sick family members and thus that statute could not be identified with any constitutional violations to which it could be congruent and proportional. *Kazmier* looked to the Congressional record *only* because it reasoned that the FMLA prohibited substantially more state employment practices than would likely be held unconstitutional under a rational basis analysis. For this reason, the FMLA could be justified only if it was congruent and proportional to actual, identified constitutional violations by States. 225 F.3d at 526. As *Nanda* recognized, however, Title VII prohibits little, if any, unconstitutional conduct. Certainly, University does not contend Title VII outlaws otherwise constitutionally permissible conduct by States. Thus, Title VII is remedial because it is directed only at unconstitutional conduct

and the purported lack of support in the Congressional record, in the language of *Kazmier*, does "not present a problem". 225 F.3d at 524-25.

Lizzi followed a similar approach, reasoning that the FMLA was not narrowly tailored to addressing equal protection violations because the statute was violated *without any* showing that an equal protection violation had occurred. For this reason, *Lizzi* concluded that the FMLA was an improper attempt to redefine States' obligations under the Fourteenth Amendment, rather than remedying an existing constitutional violation. The court therefore held that because there was no constitutional entitlement to sick leave, the FMLA was out of proportion to any remedial purpose. 255 F.3d at 135. Again, because there is a well-established equal protection right to be free from intentional racial, national origin and gender based discrimination, Title VII does not involve these concerns.

Laro also supports the Seventh Circuit's decision in *Nanda*. *Laro* distinguished the FMLA, which it felt did not directly address gender discrimination, from the Equal Pay Act, which "facially targets gender discrimination and therefore validly abrogates states' Eleventh Amendment immunity", citing *Hundermark v. Florida Dept. of Transp.*, 203 F.3d 1272, 1276 (11th Cir. 2000). 259 F.3d at 10. *Laro* therefore recognizes that statues like Title VII, that by their plain language target gender discrimination, are "appropriate legislation" under § 5 of the Fourteenth Amendment.

Laro further supports *Nanda* because *Laro* agreed that there was no need to look to the Congressional record "where the constitutional wrong is otherwise evident", citing *Florida Prepaid*, *City of Boerne*, and *Kimel*. 259 F.3d at 9 n.4. The court examined the legislative record *solely* because the FMLA provision for personal medical leave, unlike the EPA, (and Title

VII) has no direct connection to preventing unconstitutional gender-based discrimination. 259 F.3d at 16. The FMLA cases therefore do not show that *Nanda* was wrongly decided.

II. There Is No Presumption That States Act At All Times Consistent With The Fourteenth Amendment That Must Be Overcome By Findings In The Congressional Record. On The Contrary, When States Classify On The Basis Of Race, National Origin Or Gender, They Are Presumed To Act In Violation Of The Equal Protection Clause.

University repeatedly asserts that the Seventh Circuit erroneously failed to acknowledge a "presumption" that States always act in accordance with the requirements of the Fourteenth Amendment. University then contends that the Eleventh Amendment demands an explicit and detailed Congressional record of discriminatory conduct by the States before this alleged presumption can be overcome and a State's Eleventh Amendment immunity abrogated . University never contended in the District Court or in the Seventh Circuit that such a presumption existed or must be rebutted before Congress' power under § 5 of the Fourteenth Amendment may properly be exercised. This alleged "presumption" is a fiction University created for the first time in its petition to this Court. Neither the District Court nor the Seventh Circuit addressed this contention for the simple reason that the University never raised it. Accordingly, University should not be permitted to make this argument in this Court. *Sprietsma v. Mercury Marine*, __U.S. __, 123 S. Ct. 518, 522-23 n.4 (2002) (Claim that Federal maritime law governed boating accident waived because not raised in lower courts); *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) (Alternative argument for when "liability arises" under Fair Credit Reporting Act not considered because not raised or briefed below).

In the event this Court elects to consider this claim, this Court should squarely reject any such presumption. University's assertion that this Court supposedly recognized a presumption in *Garrett* that States never act in violation of the Fourteenth Amendment is an inaccurate distortion of that decision. University's argument is based upon a passage from the concurring opinion in *Garrett*, 531 U.S. at 375, set forth at page pp. 16-17 in University's petition. Far from recognizing a presumption that States always act constitutionally, all the concurring opinion did was state that there can be no *converse* presumption that States act *un*constitutionally: "It is a question of quite a different order, however, to say that States in their official capacities . . . must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens." It does not at all logically follow that simply because it may be unfair to assume that States invariably embody the unconstitutional attitudes of some of their citizens, that States are presumed to always follow the Constitution. Certainly, the concurring justices in *Garrett* never purported to so state.

University's argument also ignores the context in which the concurring justices in *Garrett* made the comments on which University relies. The passage cited by University was an effort to explain that the major problem with the ADA was that it the statute was violated even if there was no intent to discriminate on the basis of disability, without any showing that States had engaged in a pattern of unconstitutional discrimination against the disabled:

> It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens

> the equal protection of the laws, particularly where the accusation is *based not on hostility*, but instead on *the failure to act or the omission to remedy*. . . . The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the *purposeful and intentional action required to make out a violation of the equal protection clause.*

(Emphasis added). 531 U.S. at 375.

Where, however, a State classifies on the basis of race, national origin, or gender, as is outlawed by Title VII, a State has gone far beyond the failure to change policies that are now understood as incorrect under a more enlightened view of proper policy. Instead, such discrimination is the very "purposeful and intentional action required to make out a violation of the equal protection clause" that the *Garrett* concurring justices found wanting in the ADA. Thus, it is illogical to attempt to apply what the concurring justices wrote in *Garrett* about the ADA, to Title VII.

There never has been any presumption that States never discriminate when States make distinctions on the basis of race, national origin or gender. Indeed, this Court has held time and time again that when a State classifies on these bases, the only presumption that exists is that such action is *unconstitutional*. *Kimel* held that this was particularly true in the Eleventh Amendment context:

> "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are *deemed to reflect prejudice and antipathy*". . . . Older persons, again, unlike those who suffer discrimination on the basis of race or

> gender, have not been subjected to a history of purposeful unequal treatment.

528 U.S. at 83 (emphasis added; internal quotation marks omitted). *See also, Pamore v. Sidoti*, 466 U.S. 429 (1984) (Racial classification is constitutional only if there is a compelling state interest and the racial classification is narrowly tailored to accomplish that interest.); *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (Heightened scrutiny for gender); *J.E.B. v. Alabama* 511, U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (Those seeking to justify gender based classification must demonstrate an "exceedingly persuasive justification").

The other cases upon which University relies either have nothing to do with Congress' power under § 5 of the Fourteenth Amendment, or do not support its position. Certainly, none of these cases purport to hold that State employment decisions on the basis of race, national origin or gender are presumed constitutional.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) does not support University's position because that case held only that Congress lacked authority under the commerce clause to abrogate a State's Eleventh Amendment immunity. The scope of the commerce clause is not at issue in the present case. More importantly, *Seminole Tribe* reaffirmed the basic holding of *Fitzpatrick*, that the back pay and attorney fee provisions of Title VII could be enforced against the States. 517 U.S. at 59.

The discussion of State sovereignty by University, at pp. 13-16 of its petition, based on *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864 (2002) and *Prinz v. United States*, 521 U.S. 898 (1997), is also irrelevant to this case because neither *Federal Maritime* nor *Prinz* concerned the scope of Congress' power under § 5 of the

Fourteenth Amendment. *Federal Maritime* dealt with the narrow issue of whether hearings before an administrative law judge qualified as the type of judicial proceeding to which the Eleventh Amendment applied. *Prinz* was not an Eleventh Amendment case at all, but held that the temporary provisions of the Brady Handgun Violence Protection Act were an impermissible extension of the commerce clause to the inner workings of State government.

Title VII raises different concerns about the proper relationship between the Federal government and the States than those that motivated this Court in *Federal Maritime* and *Prinz* because unlike these cases, Title VII directly implicates the Fourteenth Amendment's guarantee of equal protection. What may be true about the proper relationship between the States and the Federal government with respect to the commerce clause has no application to the Fourteenth Amendment, where the States expressly agreed to surrender sovereign immunity to the Federal government and to grant Congress the corresponding power to regulate the States' conduct to enforce the rights secured by § 1of that Amendment.

For these reasons, there is no "presumption" that States act constitutionally in classifying on the basis of race, national origin or gender that must be rebutted by detailed and explicit findings in the Congressional record before Congress can validly abrogate a State's Eleventh Amendment immunity. On the contrary, this Court has repeatedly held that because of the heightened scrutiny applicable to classifications based on race, national origin or gender, and the well-documented national history of unlawful discrimination on these bases, there is little, if any, requirement that Congress make explicit findings in the record when enacting laws to prohibit such discrimination in order to properly invoke its powers under § 5 of the Fourteenth Amendment. *Nanda* properly followed these decisions. University's petition should therefore be denied.

III. Title VII Is Congruent And Proportional To The Equal Protection Clause And Therefore Congress Was Not Required To Amass An Extensive And Detailed Congressional Record Of Discrimination Before It Could Abrogate States' Eleventh Amendment Immunity. To The Extent Such A Record May Be Relevant, There Is More Than Ample Evidence In The Congressional Record To Support Applying Title VII To The States.

University argues that Title VII is not congruent or proportional to the Fourteenth Amendment injury it is designed to prevent because Congress purportedly did not identify an adequate history of discrimination in State employment. This contention should be rejected because it is the scope of the constitutional right at issue that determines if a statute is congruent and proportional to the injury it is intended to remedy, not the state of the Congressional record. The legislative record comes into play, if at all, *only* if the statute attempts to prohibit substantially more state employment decisions and practices than would be held unconstitutional under the applicable equal protection standard of review.

This Court explained in *City of Boerne* that although Congress is authorized by § 5 to enforce the Fourteenth Amendment by prohibiting conduct which is not itself unconstitutional, Congress does not have the power to decree the substance of the Fourteenth Amendment's restrictions on the States. If a statute is congruent and proportional to the injury to be prevented or remedied and the means adopted to that end, it is a proper exercise of Congress' power to enforce the Fourteenth Amendment. "Lacking such a connection, legislation may become substantive in operation and effect." 521 U.S. at 519. The Religious Freedom and Restoration Act ("RFRA") at issue in *City of Boerne* could not satisfy this test because that

statue prohibited "official actions of almost every description and regardless of subject matter" simply because there was an incidental impact on the practice of religion. 521 U.S. at 532. Although this Court noted that the RFRA's legislative record "lacked examples of modern instances of generally applicable laws passed because of religious bigotry", it plainly rejected the contention University now makes that the state of the Congressional record determines whether a statute is congruent and proportional and thus a valid abrogation of States' rights under the Eleventh Amendment:

> This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. **Judicial deference, in most cases, is based not on the state of the legislative record Congress complies**, but on due regard for the decision of the body constitutionally appointed to decide. (Citation omitted). As a general matter, it is for Congress to determine the method by which it will reach a decision.
>
> **Regardless of the state of the legislative record,** RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. . . . Remedial legislation under § 5 should be adapted to the mischief or wrong which the 14th Amendment was intended to provide against.

521 U.S. at 531-32 (emphasis added; internal quotation marks and brackets deleted).

In *Florida Prepaid*, this Court followed *City of Boerne*, noting that any Eleventh Amendment analysis requires that "we . . . first identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, . . . with reference to the historical experience . . . it reflects". 527 U.S. at 639-40. This Court reasoned that although Congress could legitimately legislate against the deprivation of a patent under the due process clause, the Patent Remedy Act was not congruent or proportional because it prohibited State conduct that did not violate the constitution:

> Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

527 U.S. at 646-47.

As to the role of Congressional findings, this Court reiterated its holding in *City of Boerne* that:

> **the lack of support in the legislative record is not determinative**. . . . [I]dentifying the targeted constitutional wrong or evil is still a **critical** part of our § 5 calculus because strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

527 U.S. at 646 (internal quotation marks deleted) (emphasis added).

In *Kimel*, the scope of the constitutional right implicated by a statute again was determinative, instead of the legislative record. State classifications based on age in the ADEA were subject to a rational basis scrutiny, which meant that governmental decisions based on age did not violate the equal protection clause unless they were irrational. The ADEA attempted to prohibit much more conduct by States than would otherwise have been constitutional because the statute penalized rational State actions on the basis of age. In language foreshadowing the Seventh Circuit's analysis in *Nanda*, this Court contrasted the ADEA with governmental classifications based on race or gender, which are *never* permissible under the equal protection clause even if there is a rational basis for such action. 528 U.S. at 83. It was for this reason that the ADEA was not congruent or proportional:

> Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. . . . The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection rational basis standard.

120 S. Ct. at 647 (internal quotation marks omitted).

This Court recognized that Congress had the power under § 5 to enact "reasonably prophylactic legislation" to remedy "difficult and intractable problems". 120 S. Ct. at 648. *Kimel* then examined the legislative record *only* because the ADEA could still be a valid exercise of Congress' § 5 power, as long

as the exercise of that authority was necessary to combat unconstitutional State conduct:

> Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. **One means** by which we have made such determination in the past is by examining the legislative record containing the reasons for Congress' action. . . . Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to perhaps an inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation.
>
> * * *
>
> **Although that lack of support is not determinative of the § 5 inquiry**, . . . Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field".

120 S. Ct. at 648-50 (emphasis added; internal quotation marks deleted).

The Seventh Circuit properly recognized that nothing in *Garrett* purported to retreat from what this Court said in *City of Boerne*, *Florida Prepaid*, or *Kimel* to create a "bright-line" rule that Congress must create a detailed and extensive record before it can properly exercise its § 5 power. After reaffirming the basic

holding of *Fitzpatrick*, this Court in *Garrett* again looked first to the nature of the constitutional right at issue. Classifications based on disability were subject to a rational basis scrutiny. The ADA prohibited State actions based on disability even though they might rationally further legitimate State purposes, and outlawed even unintentional discrimination. For this reason, the ADA made otherwise constitutional State conduct illegal. Thus, the ADA could be a valid exercise of Congress' § 5 power only if Congress could identify a history and pattern of unconstitutional discrimination on the basis of disability to justify broad, prophylactic legislation. The ADA failed because without an adequate legislative record of unconstitutional conduct by States, the ADA impermissibly redefined States' obligations under the equal protection clause.

Most importantly, this Court made it clear that no legislative record in the world could save a statute that was out of proportion to any unconstitutional conduct that might be targeted by the statute:

> Even if it were possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*. . . . The Act also makes it the employer's duty to prove that it would suffer [an undue] burden, instead of requiring (as the constitution does) that the complaining party negate the reasonable bases for the employer's decision.

531 U.S. at 372.

For these reasons, University is simply wrong in its claim that Title VII is not remedial because there supposedly is no legislative history of discrimination by the States on the basis of race, national origin or gender. Rather, the Seventh Circuit correctly followed this Court's decisions by determining whether Title VII was congruent and proportional and therefore remedial by looking to whether Title VII attempted to prohibit more State action than would otherwise be permissible under the equal protection clause. No Fourteenth Amendment right has a stricter standard of protection than classifications based on race or national origin. Racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. *Kimel*, 120 S. Ct. at 646. This Court has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, 521 U.S. at 526. States may make distinctions based on gender only if there is an "exceedingly persuasive" justification. *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). The Seventh Circuit therefore properly recognized that unlike classifications based on age or disability, State actions based on race, national origin or gender *never* comply with the equal protection clause, even if there is a rational basis for them. *Nanda* also correctly reasoned that since Title VII and the equal protection clause both require proof of intentional discrimination, Title VII prohibits little, if any, constitutional State conduct. Title VII therefore is congruent and proportional to the Fourteenth Amendment and is, as this Court recognized in *Fitzpatrick*, "appropriate legislation" under § 5 to enforce the Fourteenth Amendment.

Because Title VII satisfies the "critical part of the § 5 calculus", *City of Boerne*, 527 U.S. 646, the Seventh Circuit's holding that "the value of Congressional findings is greatly diminished", *Nanda*, 303 F.3d at 830, comports with *City of Boerne*, *Florida Prepaid*, *Kimel* and *Garrett*. Nevertheless, to the extent that the legislative record may be important, the Seventh Circuit correctly recognized that Congress was responding to a pattern of discrimination by the States. The Seventh Circuit referred to two comprehensive studies of racial and national origin discrimination. The first of these studies showed there was "widespread discrimination against minorities in State governments". The Congressional record also demonstrated there was a problem with racial and gender discrimination in academia. *Nanda*, 303 F.3d at 830. Although not cited by the Seventh Circuit, the Eleventh Circuit in *In Re Employment Litigation Against the State of Alabama*, 198 F.3d 1305,1323 (11th Cir. 1999), and the Eighth Circuit in *Okruhlik v. University of Arkansas*, 255 F.3d 615, 624-25 (8th Cir. 2001) noted that one of the same studies relied upon in *Nanda*, released in 1969 by the U.S. Commission on Civil Rights, H.R. Rep. No. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152, concluded that "employment discrimination in State and local governments is *more pervasive* than in the private sector". *Okruhlik*'s analysis was later re-affirmed by the Eighth Circuit in *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001), and this Court declined to re-examine that decision. __U.S. __, 122 S. Ct. 1300, 152 L. Ed. 2d 212 (2002).

The Seventh Circuit also properly relied upon this Court's observation in *Fullilove v. Klutznick*, 448 U.S. 448, 503, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) that the knowledge Congress gains in enacting similar legislation "reduce[s] the need for fresh hearings and prolonged debates". As noted in

Okruhlik, at the same time Congress was considering the 1972 amendments to Title VII, Congress also considered and passed the Equal Rights Amendment, the Education Amendments of 1972, Pub. L. 92-318, Title IX, 86 Stat. 373, and the Equal Opportunity Act, Pub. L. No. 92-261, 86 Stat. 103. Congress held extensive hearings and received many reports detailing racial and gender discrimination by the States. Particularly pertinent here, some of the most discriminatory practices were found in State educational institutions. *See Okruhlik*, 255 F.3d at 625 for a collection of these reports. University's only answer to an avalanche of Congressional support is to argue that these studies could not have supported Title VII because Congress did not cite these studies again as a basis for enacting Title VII. As this Court recognized in *City of Boerne*, "it is for Congress to determine the method by which it will reach a decision". 521 U.S. at 531-32. University does not and cannot explain why § 5 of the Fourteenth Amendment should require Congress to repeat what it has already demonstrated is true in connection with similar legislation in order to uphold Title VII.

Finally, this Court can also look to its own litany of decisions recognizing that "those who suffer discrimination on the basis of race or gender have . . . been subjected to a history of purposeful unequal treatment" in this country. *Kimel*, 120 S. Ct. at 645. This Court has "continued to recognize the necessity of using strong remedial measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, 521 U.S. at 526. In light of this well-documented evidence of racial and gender discrimination, the Seventh Circuit was eminently correct in concluding that Congress had ample support for the exercise of its power under § 5 of the Fourteenth Amendment to enact the 1972 amendments to Title VII.

CONCLUSION

Title VII was a proper exercise of Congress' power under § 5 of the Fourteenth Amendment because it prohibits little, if any, constitutional conduct by the States. For this reason, a detailed and explicit legislative record of a pattern of unconstitutional State action was not required before Congress abrogated the States' Eleventh Amendment immunity. To the extent the Congressional record is relevant, Congress had a firm foundation upon which to extend Title VII to the States. Accordingly, the University's petition for writ of *certiorari* should be denied.

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No. 02-925

In the Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, ET AL.

v.

NAVREET NANDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 303 F.3d 817. The opinion of the district court (Pet. App. 31a-42a) is reported at 219 F. Supp. 2d 911.

JURISDICTION

The court of appeals entered its judgment on September 17, 2002. The petition for a writ of certiorari was filed on December 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). As originally enacted, Title VII applied only to private employers. In 1972, Congress amended the statute to include state and local "governments [and] governmental agencies" within its definition of "person" and "employer." 42 U.S.C. 2000e(a) and (b). In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that, under the 1972 amendments, congressional intent to abrogate the States' Eleventh Amendment immunity and "congressional authorization to sue the State as employer is clearly present." *Id.* at 452 (citation and internal quotation marks omitted).

2. Respondent Navreet Nanda was employed by the University of Illinois as an assistant professor of microbiology. Pet. App. 1a-2a. In 1998, the University notified Nanda that her employment would terminate on August 31, 1999. *Id.* at 2a. After exhausting the University's internal grievance procedures, Nanda filed suit against petitioners (the University's Board of Trustees and various University officials sued in their official capacities) in federal district court, alleging, *inter alia*, that their termination of her employment was the result of intentional discrimination on the bases of her race, sex, and national origin, in violation of Title VII. The complaint sought injunctive relief and damages. *Id.* at 2a-3a.

Petitioners moved to dismiss on the ground that they were immune from suit under the Eleventh Amendment. Pet. App. 3a. The district court denied that motion, holding that Title VII validly abrogates the States' Eleventh Amendment immunity from suit. *Id.* at 32a-37a.

3. The court of appeals affirmed. Pet. App. 1a-30a. The court reasoned that Title VII's prohibition of disparate treatment by state employers on the bases of race, sex, and national origin tracks the requirements of the Equal Protection Clause, *id.* at 23a-25a, and thus that "Title VII enforces the Fourteenth Amendment without altering its meaning," *id.* at 26a (internal quotation marks omitted). The court of appeals also concluded that "Congress was responding to a pattern of discrimination by the States." *Id.* at 27a. The court accordingly ruled that, in extending Title VII to state employers, Congress properly acted pursuant to its Section 5 power to enforce the Equal Protection Clause and validly abrogated the States' Eleventh Amendment immunity. *Id.* at 28a.

ARGUMENT

Because the court of appeals' decision is correct and consistent with the rulings of other circuits and of this Court, further review is not warranted.

1. Petitioners argue (Pet. 8) that this Court should grant review to address a "lower-court split over whether the 1972 Amendments to Title VII * * * are appropriate enforcement legislation under Section 5 of the Fourteenth Amendment" (capitalization omitted). There is no such split in the courts of appeals. Every court of appeals to consider the question has concluded, like the court of appeals here, that Congress's extension of Title VII to state employers reflects a proper

exercise of the Section 5 power and, thereby, validly abrogates the States' Eleventh Amendment immunity. See *Okruhlik* v. *University of Ark.*, 255 F.3d 615, 624-627 (8th Cir. 2001); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.), cert. denied, 531 U.S. 1052 (2000); *Holman* v. *Indiana*, 211 F.3d 399, 402 n.2 (7th Cir.), cert. denied, 531 U.S. 880 (2000); *Jones* v. *WMATA*, 205 F.3d 428, 434 (D.C. Cir. 2000); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1321-1322 (11th Cir. 1999); *Ussery* v. *Louisiana*, 150 F.3d 431, 434-435 (5th Cir. 1998), petition for cert. dismissed, 526 U.S. 1013 (1999); *Cerrato* v. *San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 975-976 (9th Cir. 1994).

While petitioners assert (Pet. 11-12) that review is necessary because the case "concerns the proper respect and dignity due the States," this case no more implicates that interest than the other Title VII abrogation case in which the Court recently denied certiorari. See *Maitland* v. *University of Minn.*, 260 F.3d 959 (8th Cir. 2001), cert. denied, 535 U.S. 929 (2002).

Petitioners' reliance (Pet. 8-10) on *Laro* v. *New Hampshire*, 259 F.3d 1 (1st Cir. 2001), *Lizzi* v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), cert. denied, 534 U.S. 1081 (2002), *Chittister* v. *Department of Community and Economic Development*, 226 F.3d 223, 225 (3d Cir. 2000), and *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000), is equally misplaced. None of those decisions addressed the constitutionality of Title VII's abrogation of Eleventh Amendment immunity. They all involved Congress's power to abrogate Eleventh Amendment immunity under a different law—the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.* Moreover, *Laro*, *Lizzi*, and *Chittister* all involved the Family and Medical Leave Act's individual

sick leave provision, 29 U.S.C. 2612(a)(1)(D), a provision that the United States no longer defends as legislation designed to combat gender discrimination. See *Laro*, 259 F.3d at 4 & n.1; *Lizzi*, 255 F.3d at 131; *Chittister*, 226 F.3d at 225; see also U.S. Br. in Opp. at 8 n.2, *Nevada Dep't of Human Res.* v. *Hibbs*, No. 01-1368 (argued Jan. 15, 2003).[1] Those cases simply have no bearing on the question of Congress's authority to enact Section 5 legislation, such as Title VII, targeted at racial and gender discrimination.

2. Contrary to petitioners' argument (Pet. 12-27), the court of appeals' decision is correct and consistent with decisions of this Court.

a. Petitioners do not dispute that "Congress has 'unequivocally expresse[d] its intent to abrogate the [States'] immunity.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 635 (1999). Nor could they. See *Quern* v. *Jordan*, 440 U.S. 332, 344 (1979); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976).

Furthermore, in extending Title VII to state employers, Congress properly exercised its Section 5 power to enforce the Equal Protection Clause. The Equal Protection Clause prohibits intentional discrimination by state governments on the bases of race, *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997), sex, *United States* v. *Virginia*, 518 U.S. 515, 523 (1996), and national origin, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). Those prohibitions extend to discrimination in government employment. *Davis* v. *Passman*, 442

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[1] This Court is currently considering the question whether the family leave provisions of the Family and Medical Leave Act are a valid exercise of Congress's Section 5 power. See *Nevada Dep't of Human Res.* v. *Hibbs*, No. 01-1368.

U.S. 228 (1979); *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 309-310 & n.15 (1977).

The provision of Title VII at issue here tracks that constitutional prohibition by making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). As this Court has recognized on numerous occasions, that provision prohibits intentional discrimination by state employers on the bases of race, sex, and national origin. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 985-986 (1988); *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983).

Congress acted, moreover, against the backdrop of this Nation's "undeniable" "history of racial discrimination," *McCleskey* v. *Kemp*, 481 U.S. 279, 298 n.20 (1987), and its "long and unfortunate history of sex discrimination," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). Employment discrimination by state actors is part of that history. See, *e.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982).

b. Petitioners argue (Pet. 13-18) that the court of appeals failed to proceed from the premise that States presumptively act constitutionally. That presumption, however, has no application when state action differentiates between employees based on their race, sex, or national origin. Such actions are subject to heightened scrutiny by this Court—a mode of analysis that presumes the differential treatment is unconstitutional unless the State demonstrates that it advances a com-

pelling or exceedingly persuasive governmental interest and is narrowly tailored or substantially related to that interest. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 105 (2001) (per curiam); *Virginia*, 518 U.S. at 531. The standards of proof in disparate treatment cases under Title VII parallel that constitutional model. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Petitioners also contend (Pet. 18-27) that Congress compiled an insufficiently exhaustive legislative history to support the conclusion that States have engaged in a long pattern of discrimination on the bases of race and gender. That argument is meritless for two independent reasons. First, Article I of the Constitution identifies the constitutional preconditions to Congress's exercise of its legislative authority. Nothing in that Article requires the creation or compilation of legislative histories. Nor do this Court's cases. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) ("[L]ack of support" in the legislative record "is not determinative of the § 5 inquiry."); *Florida Prepaid*, 527 U.S. at 646 ("[L]ack of support in the legislative record is not determinative."); *City of Boerne* v. *Flores*, 521 U.S. 507, 531 (1997) (validity of Section 5 legislation is not determined by "the state of the legislative record").[2]

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[2] See also *United States* v. *Morrison*, 529 U.S. 598, 612 (2000); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 213 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."); *United States* v. *Lopez*, 514 U.S. 549, 562 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) ("Congress is not required to build a record in the legislative history to defend its policy choices.").

Second, this Nation's long history of discrimination on the bases of race, gender, and national origin is well documented in the decisions of this Court, and indeed forms the very predicate for this Court's application of heightened scrutiny to state action. See, *e.g.*, *Virginia*, 518 U.S. at 531 (state action "denying rights or opportunities based on sex" is recorded in "volumes of history"); *McCleskey*, *supra*; *Oyama* v. *California*, 332 U.S. 633, 646 (1948) ("[A]s a general rule, [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.") (internal quotation marks omitted). Nothing in Section 5 compels Congress to belabor the obvious in legislative history that it has no constitutional obligation to create in the first place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, Ph.D., GERALD MOSS, M.D., ELIZABETH HOFFMAN, Ph.D., DAVID C. BROSKI and JAMES J. STUKEL, Ph.D.,

Petitioners,

v.

NAVREET NANDA and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. THE CIRCUIT COURTS OF APPEAL LACK CLARITY AS TO THE STANDARDS TO APPLY WHEN ADJUDICATING THE LEGITIMACY OF SECTION 5 CONGRESSIONAL ENACTMENTS THAT ABROGATE SOVEREIGN IMMUNITY, ESPECIALLY IN RESPECT TO GENDER BASED CLASSIFICATIONS.

It is not useful or rational to assert, as the Government[1] and Respondent do in their briefs in opposition, that there is no dichotomy or confusion among the circuit courts of appeal as to the standards to be applied when adjudicating the legitimacy of Section 5 Congressional enactments that abrogate the States' sovereign immunity merely because two different congressional enactments are under scrutiny. (U.S. Br. pp.4-5; Resp. Br. p.13).[2] Reason dictates that the same constitutional standards embodied in the Court's Section 5 and Eleventh Amendment jurisprudence be applied equally whether the Congressional act under scrutiny is the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.* or, as here, the 1972 Amendments to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Nor is it useful or rational to assert that the circuit courts of appeal are not divided as to the exact nature of the findings and the quantum and quality of the evidence that Congress must demonstrate in its legislative record to constitutionally exercise its Section 5 power in abrogating the States' sovereign immunity.

For example, the Ninth Circuit in *Hibbs v. HDM Dep't of Human Resources*, 273 F.3d 844, 858 (9th Cir. 2001), upheld

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1. "Government" refers to the United States Department of Justice, Office of the Solicitor General.

2. "U.S. Br." refers to the Brief for the United States In Opposition filed by the Solicitor General. "Resp. Br." refers to the Brief In Opposition for Respondent Navreet Nanda, Ph.D. filed by the Respondent.

the FMLA as a legitimate exercise of Section 5 power placing very little, if any, weight on evidence in the Congressional Record as to the States' behavior as to the targeted unconstitutional conduct. The Fifth Circuit in *Kazmier v. Widmann*, 225 F.3d 519, 524 (5th Cir. 2000), held the exact opposite, stating that such evidence was absolutely essential and wholly lacking. Moreover, in *Nanda v. Board of Trustees of the Univ. of Illinois, et al.*, 303 F.3d 817, 827-828 (7th Cir. 2002), the Seventh Circuit as it did in *Varner v. Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000) and *Cherry v. University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 549 (7th Cir. 2001), held that explicit legislative findings are not a necessary element of a Section 5 inquiry, and, in any event, not dispositive. In *Chittister v. Department of Community & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000), *Lizzie v. Alexander*, 255 F.3d 128, 135 (4th Cir. 2001) and *Laro v. New Hampshire*, 259 F.3d 1, 13 (1st Cir. 2001), however, the Third, Fourth and First Circuits, respectively, clearly required explicit legislative findings of a widespread pattern of the targeted unconstitutional conduct by States as being essential to a Section 5 inquiry and predicate to the legitimacy of the enactment. Further, while a person reading *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-374 (2001), is compelled to conclude from the extended arguments between the members of the Court, and indeed from the express emphatic language of the majority and concurring opinions, that explicit legislative findings of a widespread pattern of the targeted unconstitutional behavior by States is both essential and *predicate* to a legitimate Section 5 enactment, the courts of appeal are plainly not persuaded as to such requirements. The Seventh Circuit here, in *Nanda*, is plainly not so persuaded. The divisions and confusion as to these proper standards in respect to a Section 5 inquiry will remain to the prejudice and detriment of the sovereign States, absent further clarifying expressions by the Court.

Confusion and division also remain among the circuit courts in respect to the meaning and scope of the Court's opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11 (1976), vis-a-vis the legitimacy of Congress' exercise of its Section 5 power when enacting the 1972 Amendments to Title VII. For example, the Eighth Circuit in *Okruhlik v. University of Arkansas*, 255 F.3d 615, 622 (8th Cir. 2001), wholly relied upon *Fitzpatrick* in upholding the Title VII Amendments as a legitimate Section 5 enactment, but the same court in a subsequent opinion in *Maitland v. University of Minnesota*, 260 F.3d 959, 964 (8th Cir. 2001), rejected *Fitzpatrick* as precedent for that proposition. Moreover, the Seventh Circuit also rejected *Fitzpatrick* as precedent to the issue before it here in *Nanda*, 303 F.3d at 822. Nevertheless, the Government and Respondent insist in their briefs in opposition that *Fitzpatrick* was and is dispositive. The Court should also put this confusion and division among the circuits to rest.

Finally, the issues presented in this petition are substantial constitutional issues, the resolutions of which are vital to the States thereby in any event requiring no showing of a split among the circuit courts of appeal. *See, e.g., Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 66 (1986); *Jefferson County Pharm. Ass'n, Inc. v. Abbott Lab.*, 460 U.S. 150, 153 (1983); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 402 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 14 (1979) (in each case, granting certiorari to resolve important questions of federal law absent a split of authority).

II. ELEVENTH AMENDMENT JURISPRUDENCE PROHIBITS CONGRESS FROM ENACTING LEGISLATION, INCLUDING LEGISLATION IN RESPECT TO RACE, GENDER AND NATIONAL ORIGIN CLASSIFICATIONS, THAT ATTEMPTS TO SUBJECT SOVEREIGN STATES TO FEDERAL JURISDICTION, UNLESS IT FIRST REBUTS IN ITS LEGISLATIVE RECORD THE PRESUMPTION THAT THE STATES ARE AT ALL TIMES ACTING CONSTITUTIONALLY IN RESPECT TO RACE, GENDER AND PERSONS OF DIVERSE NATIONAL ORIGIN.

The Government and Respondent assert in their briefs in opposition that the States, like private citizens, may be subjected automatically to federal jurisdiction by congressional fiat whenever race, gender or national origin classifications are implicated. (U.S. Br. p.6; Resp. Br. p.20). They further argue that when such classifications are implicated, the States are not presumed to act constitutionally, but rather must rebut the presumption that they acted in violation of the Constitution. *Id.*

These assertions and contentions make no sense in that they beg the very issue of immunity. Equal sovereign States are not private citizens. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 634 (1999); *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864, 1874 (2002). Congress is prohibited by this Court's jurisprudence from treating sovereign States as if they were. *Id.* Unlike the imposition of federal jurisdiction by Congressional fiat over private citizens who enjoy no presumption of acting at all times in a constitutional manner, Congress may not attempt to impose its jurisdiction over sovereign States without first complying with this Court's

strictures. *Garrett*, 531 U.S. at 368-374. Eleventh Amendment jurisprudence repeatedly has instructed Congress that the States are equal sovereign entities that are presumed at all times to act constitutionally and that *before* it attempts through the exercise of its Section 5 power to assert jurisdiction over those entities, it must rebut that presumption with solid reliable evidence to the contrary in its legislative record. *Florida Prepaid*, 527 U.S. at 640-647; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89-91 (2000); *Garrett*, 531 U.S. at 368-374. The cases cited by the Government and Respondent in their briefs in opposition do not warrant a different conclusion. In those cases, it was merely assumed by the Courts that the State litigants were not immune as a result of their sovereignty. In other words, none of the cited cases addressed the paramount issue raised here; namely, whether States in the first instance were properly made subject to the federal jurisdiction of Title VII. The arguments of the Government and Respondent, therefore, are without reason and contrary to this Court's established jurisprudence.

III. THE ASSERTION THAT THE NATION'S LONG HISTORY OF DISCRIMINATION AS DOCUMENTED IN THIS COURT'S DECISIONS SUFFICES FOR CONGRESS' ATTEMPTED ABROGATION OF THE STATES' SOVEREIGN IMMUNITY BY THE ENACTMENT OF THE 1972 AMENDMENTS TO TITLE VII IS SPECIOUS.

The Government and Respondent assert in their briefs in opposition that the nation's long history of discrimination as documented in the decisions of this Court can be readily substituted for the non-existent Title VII legislative record both to support the conclusion that the States engaged in such discrimination practices and to support abrogation. (U.S. Br. p.6; Resp. Br. p.29). This argument is specious. *First*, in 1972

when the Title VII Amendments were enacted, there was absolutely no history of discriminatory activities by States documented in this Court's decisions for Congress to consider. *Second*, in 1964 when the Civil Rights Act was initially enacted, including Title VII, the States were expressly excluded from coverage precisely because of their Eleventh Amendment rights. Whatever occurred between 1964 and 1972 to cause Congress to reverse its relationship with the States and attempt abrogation, it was certainly not decisions of this Court purportedly documenting the States' bad acts during that eight-year time period. *Lastly*, had Congress relied in 1972 on this Court's decisions as support for its attempted abrogation of the States' sovereign immunity, it could easily have stated so in the legislative record. *Garrett*, 531 U.S. at 371. The fact that it did not do so establishes that the reliance argument proffered by the Government and Respondent is of no merit.

CONCLUSION

For all of the reasons stated in its Petition for a Writ of Certiorari as well as reasons set forth above, the Petitioner, The Board of Trustees of the University of Illinois, respectfully petitions the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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